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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 663

WHEELING STEEL CORPORATION, APPELLANT,

vs.

FRED L. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, AND KARL G. SAILER, ASSESSOR OF OHIO COUNTY, WEST VIRGINIA

APPEAL FROM CIRCUIT COURT OF OHIO COUNTY, STATE OF WEST VIRGINIA

FILED DECEMBER 28, 1935.

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IN CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

In the Matter of the Appeal of WHEELING STEEL CORPORATION, a Corporation, from the Assessment of Certain of its Intangible Property for the Year 1933 by the Assessor of Ohio County, West Virginia, as Corrected by the Tax Commissioner of the State of West Virginia.

PETITION FOR APPEAL

To their Honors, Judges of the Supreme Court of Appeals of West Virginia:

The petitioners, the State of West Virginia, the County of Ohio and The Board of Education of the County of [fol. 2] Ohio, respectfully represent that they are aggrieved by a final judgment order entered by the Circuit Court of Ohio County, West Virginia, on the 5th day of March, 1934, upon an appeal to that court by the Wheeling Steel Corporation from a decision of the Assessor of Ohio County and the corrections thereto made by the State Tax Commissioner of the State of West Virginia, as provided in Chapter 11, Article 3, Section 25, of the Official Code of West Virginia, (Chapter 41 of the Acts of the Legislature, Regular Session 1933, H. B. 554).

Agreed Statement of Facts

This proceeding is statutory, and was instituted by the petitioner in the manner provided in and as directed by Chapter 11, Article 3, Section 25, of the West Virginia Code (Chapter 41 of the Acts of the Legislature, Regular Session, 1933, H. B. 554); notice was served as therein provided; all the requirements of law in the matter of this appeal have been fully performed by the petitioner, and this proceeding is regularly and properly pending before this Court.

The Petitioner is a Delaware Corporation

Wheeling Steel Corporation was incorporated June 21, 1920, in the State of Delaware, and was such a Delaware corporation on January 1, 1933, and was then and is now qualified to do business as a foreign corporation in the States of West Virginia, Ohio and Minnesota. It was originally designed to be a holding company, and from the date of its incorporation until the year 1923, its sole function was to hold all the capital stock of various companies, its principal subsidiaries being Wheeling Steel and Iron Company, La Belle Iron Works, and Whitaker-Glessner Company, all West Virginia corporations, and Consumers Mining Company, LaBelle Coke Company and Wheeling Coke Company, all Pennsylvania corporations.

[fol. 3] In 1923, the manufacturing properties of the three first above-named subsidiary companies were conveyed to Wheeling Steel Corporation, which thereupon became primarily and now is an operating company, and the West Virginia corporations were subsequently dissolved. The petitioner, Wheeling Steel Corporation, also controls several subsidiary companies organized and doing business in various states.

The Wheeling Steel Corporation's reasons for incorporation in Delaware were as follows:

1. Being originally a holding company, it owned very little tangible property.

2. The greater part of the tangible property previously controlled by the petitioner through stock ownership, and now owned by it, was and is located outside West Virginia.

3. By incorporating in a state other than Ohio and West Virginia the petitioner could bring and defend actions in the Federal courts.

4. The laws of the State of Delaware favored corporations.

5. Financial structures permitted under the laws of the State of Delaware were flexible, designed to meet changing conditions.

6. The Delaware constitution provided that shares of the capital stock of Delaware corporations could not be taxed by any law then or thereafter existing.

7. Delaware incorporation fees and annual franchise taxes were low, compared with those imposed by other states.

[fol. 4] 8. Delaware exacted no tax upon the transfer or issue of the capital stock.

9. In 1920 intangible personal property was taxable in West Virginia at the same rate as that assessed upon real estate and tangible personal property.

Location of the Offices of the Wheeling Steel Corporation

The Corporation Law of the State of Delaware, as it existed in 1920 and on January 1, 1933, and as it now existed, requires each corporation organized thereunder to state in the certificate of incorporation the name of the county and the city, town or place within the county in which its principal office or place of business is to be located in that State.

The principal office of Wheeling Steel Corporation in the State of Delaware is stated in its charter to be located at 901 Market Street, in the city of Wilmington, County of New Castle, and was on January 1, 1933, and is now located at 900 Market Street in said city of Wilmington.

The Wheeling Steel Corporation maintains its principal office in Delaware through the Corporation Service Company, a corporation, as permitted and required by the laws of Delaware. The principal office maintains a duplicate stock ledger and records of all transactions with reference to petitioner's capital stock. The originals of such ledger and records are kept in New York City. The Wheeling Steel Corporation does not have any individual office building or suite of offices in the State of Delaware, but maintains such an office as is required by Delaware laws for corporations organized in that State. Petitioner, Wheeling Steel Corporation, files such reports and pays such franchise taxes as are required by the State of Delaware to be filed and paid by a corporation organized and existing under the laws of that State.

[fol. 5] The Wheeling Steel Corporation's general business offices are located in Wheeling, Ohio County, West Virginia, and it maintains sales offices in Atlanta, Georgia; Buffalo, New York; Cincinnati, Ohio; Detroit, Michigan; New Orleans, Louisiana; Philadelphia, Pennsylvania; San

Francisco, California; Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Los Angeles, California; St. Louis, Missouri; Seattle, Washington, and New York City.

The Wheeling Steel Corporation's general books and accounting records are kept at the Wheeling office. Plant offices maintain original detailed accounting records showing (a) materials received, (b) railroad cars received and shipped, (c) detailed labor costs, (d) production and shipments, (e) detailed stocks of goods and (f) payrolls. Employment offices are maintained at each plant.

Sales contracts are negotiated and orders are taken by the various sales offices subject to acceptance or rejection at Wheeling.

The Portsmouth, Ohio, plant makes up and mails out invoices for all products shipped from that plant, together with bills of lading and shipping notices. All other plants prepare complete invoices with exception of information with reference to the price of material described therein. The latter invoices are then forwarded to Wheeling where they are completed and mailed to the customer. Bills of lading and shipping notices are, however, mailed to customers from the individual plants. All invoices are payable in Wheeling.

The majority of commercial accounts are paid by check issued in Wheeling. Payrolls are made up and payroll checks are prepared and signed at the various plants and are distributed to the employees by the respective plants. Such checks are paid with funds on deposit in banks in localities where the plants are situated.

Under the law of Delaware, stockholders' and directors' meetings of Delaware corporations may be held within or without the State of Delaware; meetings of directors and stockholders of the Wheeling Steel Corporation are held [fol. 6] in Wheeling. Such meetings are held in conformity with the laws of Delaware.

The Chairman of the Board, President, Treasurer, Secretary and Chief Counsel reside at Wheeling. Local counsel are retained in the cities in Ohio in which the principal plants are located.

The capital stock is transferable in both New York City and Wheeling, but is registerable only at the office of the

Registrar in New York City. Capital stock records are maintained in New York City and at the Wheeling Steel Corporation's Delaware office.

Dividends, when declared, are ordered to be paid and distributed at meetings held at Wheeling, although the checks are drawn and distributed by the Dividend Disbursing Agent located in New York City, and are paid with funds on deposit in banks in New York City.

The petitioner, Wheeling Steel Corporation, owns a twelve-story office building situated in Wheeling, approximately forty-three (43) per cent of which is occupied by officers and office employees of the Petitioner.

Location of the Properties of the Wheeling Steel Corporation

Manufacturing plants operated by the petitioner, Wheeling Steel Corporation were, on January 1, 1933, and are now located as follows:

West Virginia

Wheeling, Ohio County.

Benwood, Marshall County (5 miles from Wheeling Office).

Follansbee, Brooke County (25 miles from Wheeling Office).

Beech Bottom, Brooke County (12 miles from Wheeling Office)

[fol. 7]

Ohio

Steubenville, Jefferson County (25 miles from Wheeling Office).

Yorkville, Jefferson County (25 miles from Wheeling Office).

Martins Ferry, Belmont County (3 miles from Wheeling Office).

Portsmouth, Scioto County (200 miles from Wheeling Office).

On January 1, 1933, the Wheeling Steel Corporation owned, and now owns coal properties in both West Vir-

ginia and Ohio, and iron ore properties in Minnesota, and controls, through stock ownership, coal properties in Pennsylvania and Kentucky.

The Wheeling Steel Corporation, on January 1, 1933, owned four steamboats, two motor ships, eighty-five coal barges, six freight barges and two fuel barges, operating on the Allegheny, Ohio and Mississippi Rivers, transporting coal and steel. These boats are registered at the Port of Pittsburgh. The petitioner's first and Refunding Mortgage and Deed of Trust, dated as of July 1, 1923, which is a lien upon the above river equipment, is recorded in Delaware.

The total assessed value of the real estate and tangible personal property owned by the Wheeling Steel Corporation on January 1, 1933, was $31,977,600.00. The assessed value of its real estate and tangible personal property in West Virginia was $8,673,205.00 or 27.10% of the total.

The following table shows the assessed values of the real estate and tangible personal property of the Wheeling Steel Corporation as of January 1, 1933, and the percentages thereof located in the various counties of the State of West Virginia, and the total assessed value of such properties located outside West Virginia:

[fol. 8]

	Assessed Value	Percentage of Assessed Value
Berkeley County, W. Va.	$6,945	.02%
Brooke County, W. Va.	3,840,500	12.00%
Marshall County, W. Va.	3,047,520	9.52%
Mason County, W. Va.	105,690	.33%
Ohio County, W. Va.	1,672,550	5.23%
Total in West Virginia	8,673,205	27.10%
Total outside West Virginia	23,324,395	72.90%
	$31,997,600	100.00%

The following table shows the total shipments and percentage thereof made by Wheeling Steel Corporation in 1932 from its various plants, the shipments from West Virginia plants being indicated by counties:

	Value.	Percentage
Brooke County, West Virginia	$1,511,855.93	8.31%
Marshall County, West Virginia	2,773,343.88	15.24%
Ohio County, West Virginia	117,672.20	.65%
Total shipments from West Va. plants	4,402,872.01	24.20%
Total shipments from plants located outside West Virginia	13,787,742.25	75.80%
	$18,190,614.26	100.00%

Shipments from plants located in Jefferson County, Ohio, amounted, in 1932, to $8,941,949.83, and shipments from plants located in Scioto County, Ohio, amounted to $3,737,525.27.

Other bases for comparisons between activities of the Corporation carried on within and without the State of West Virginia are as follows:

[fol. 9] Production of Finished Material for Sale in 1932

	Gross tons	Percentage
Produced in West Virginia	58,868	15.6%
Produced outside West Virginia	319,374	84.4%
Total	378,242	100.00%

Cost of Production of Finished Material for Sale in 1932

	Value	Percentage
In West Virginia	$2,083,875.09	15.05%
Outside West Virginia	13,383,690.92	84.95%
Total	$15,467,566.01	100.00%

Average Number of Employees in 1932

	Number	Percentage
In West Virginia	1,395	19.45%
Outside West Virginia	5,775	80.55%
Total	7,170	100.00%

Average Number of Employees in 1933 (First Six Months)

	Number	Percentage
In West Virginia	2,503	26.62%
Outside West Virginia	6,901	73.38%
Total	9,404	100.00%

Payrolls in 1932

	Amount	Percentage
In West Virginia	$1,417,273.53	16.22%
Outside West Virginia	7,320,964.24	83.78%
Total	$8,738,237.77	100.00%

[fol. 10] Payrolls in 1933 (First Six Months)

	Amount	Percentage
In West Virginia	$840,500.66	17.17%
Outside West Virginia	4,054,509.79	82.83%
Total	$4,895,010.45	100.00%

Purchases in 1932

	Amount	Percentage
In West Virginia	$831,831.03	10.58%
Outside West Virginia	7,032,271.37	89.42%
Total	$7,864,102.40	100.00%

Purchases in 1933 (First Six Months)

In West Virginia	$634,381.78	11.12%
Outside West Virginia	5,072,575.38	88.88%
Total	$5,706,957.16	100.00%

Ingot Capacity

	Tons per year	Percentage
Benwood, West Virginia	250,000	16.6%
Steubenville, Ohio	750,000	50.0%
Portsmouth, Ohio	500,000	33.4%
	1,500,000	100.0%

"Ingot Capacity" is a recognized basis of determining the producing ability of a steel company.

The Tax Return

The Wheeling Steel Corporation filed its tax return, being Form S.T.C.O. No. 3, with the Assessor of Ohio County, West Virginia, for the assessment year beginning January 1, 1933, as required by law.

[fol. 11] In its said return the Wheeling Steel Corporation reported the items in dispute as follows:

Item 1. (Money on hand and on deposit)	$312,729.00
Item 6. (Accounts and notes receivable)	72,310.00
	$385,039.00

The Assessor's Revaluation of Money

The Assessor verbally advised representatives of the petitioner that he had procured a copy of the "Wheeling Steel Corporation and Subsidiary Companies Consolidated Balance Sheet" as at December 31, 1932, in which appears the item "Cash in banks and on hand—$2,703,974.38", deducted therefrom the cash reported to him on tax returns for the same period made by three subsidiary companies of the petitioner, as follows:

Wheeling Corrugating Company	$277,580.00
The Consolidated Expanded Metal Co.	15,792.00
Ackermann Manufacturing Company	3,156.00
	$296,528.00

and valued the Wheeling Steel Corporation's money on hand and on deposit at $2,517,450.00. We are unable to state how this latter figure was reached, for, following the Assessor's stated procedure, the correct remainder is $2,407,446.38. It is also to be noted that in the Assessor's Answer to the Wheeling Steel Corporation's Protest (Exhibit C) the Assessor's valuation of this item is $2,380,300.00. It is agreed that the total amount of cash in banks and on hand on January 1, 1933, owned by the petitioner, was $2,307,773.61.

The Assessor's Revaluation of Receivables

The Assessor also verbally advised representatives of the Wheeling Steel Corporation that he had obtained from

the above-mentioned "Wheeling Steel Corporation and [fol. 12] Subsidiary Companies Consolidated Balance Sheet" the following items:

Accounts and notes receivable, less reserve	$3,277,848
Advance payments on ore contracts	153,311
Balance due from Employees under stock purchase plan	59,676
	$3,492,835

deducted therefrom the accounts and notes receivable reported to him on tax returns for the same period made by three subsidiary companies of the petitioner as follows:

Wheeling Corrugating Company	$880,890
The Consolidated Expanded Metal Co.	111,460
Ackermann Manufacturing Company	53,972
	$1,046,322

and valued the accounts and notes receivable of the Wheeling Steel Corporation at $2,446,500.00. It is to be noted, however, that in the Assessor's Answer to the Wheeling Steel Corporation's protest, (Exhibit C), the Assessor's valuation of this item is $2,399,000. It is agreed that the total amount of accounts and notes receivable due the petitioner on January 1, 1933, less doubtful and disputed claims estimated at their probable worth, was $2,234,743.11.

Certification of Questions to State Tax Commissioner

Pursuant to the statute the Assessor, upon request of the petitioner, regularly and properly certified to the State Tax Commissioner the questions of valuation of the money on hand and on deposit and of the accounts and notes receivable of the petitioner.

The State Tax Commissioner's Decision

The State Tax Commissioner considered the questions raised by the Petitioner's Protest and the Assessor's An- [fol. 13] swer thereto, allowed as deductions from $2,517,450.00 (one of the valuations placed by the Assessor upon the petitioner's money on hand and in bank) various sums

of money totalling $72,530.57 held or deposited by subsidiary companies of the petitioner other than three subsidiary companies herein specifically mentioned, and instructed the Assessor that the remainder, or $2,444,919.43, be assessed to the petitioner.

The State Tax Commissioner further allowed as deductions from $2,446,500 (one of the valuations placed by the Assessor upon the petitioner's accounts and notes receivable) various accounts and notes receivable totalling $244,783.92 which were payable to subsidiary companies of the petitioner other than those subsidiary companies herein specifically mentioned, and also allowed as a deduction the item appearing in said Consolidated Balance Sheet as "Advance Payments on Ore Contracts—$155,311.84"; and instructed the Assessor that the remainder, or $2,046,404.24, be assessed to the Wheeling Steel Corporation.

The State Tax Commissioner refused to allowed as a further deduction the item appearing on the aforesaid Consolidated Balance Sheet as "Balance Due from Employees under Stock Purchase Plan—$59,675.16". This money was, on January 1, 1933, owed to the petitioner by employees residing in various states, and represents the unpaid purchase price of capital stock of the petitioner sold by it to said employees. Of the above amount, the sum of $25,238.66 was owed to the Wheeling Steel Corporation by residents of West Virginia.

Petitioner's Computation of Its Cash Taxable in West Virginia

The total amount of cash in banks and on hand on January 1, 1933, owned by the Wheeling Steel Corporation was $2,307,773.61, located as follows:

[fol. 14] In West Virginia	$849,161.99
In Ohio	204,733.20
In Pennsylvania	660,626.25
In New York	589,599.04
In Illinois	3,663.13
	$2,307,773.61

practically all of which had been received as the proceeds from sales of goods shipped in interstate commerce which

had been manufactured in West Virginia and elsewhere in the values and proportions hereinbefore shown.

The petitioner was advised by counsel that it need not report for taxation in West Virginia the total of its cash in banks and on hand, and that it should report only that proportion of the total which past experience had proved was needed in its West Virginia business. The statutes of this State do not provide any method of allocation. The petitioner used the following formula:

West Virginia payrolls—West Virginia purchases x total cash—Cash subject to tax in West Virginia Total payrolls total purchases

In figures, the formula appears as follows:

$$\frac{1{,}417{,}273.53 - 831{,}831.03}{8{,}738{,}237.77 - 7{,}864{,}102.40} \times 2{,}307{,}773.61 - 312{,}703.32$$

The Corporation reported, under Item 1 of the return, the sum of $312,729.00 or 13.58%.

Paragraph B, of Part XI of the Petition filed in this proceeding, appearing on page 4 thereof, sets forth inaccurately the method used by the Wheeling Steel Corporation in computing its cash in banks and on hand taxable in West Virginia. In all proceedings in this cause said paragraph shall be taken to read as follows:

"B. In returning for taxation as hereinbefore set out [fol. 15] the item of $312,729.00 as cash, the amount thereof was returned by petitioner upon advice of counsel and represented that proportion of its total cash which the sum of its West Virginia payrolls and West Virginia purchases during 1932 bore to its total payrolls and purchases during said period."

Petitioner's Computation of its Accounts and Notes Receivable Subject to Taxation in West Virginia

The total amount of accounts and notes receivable due the petitioner on January 1, 1933, less doubtful and disputed claims estimated at their probable worth, was $2,234,743.11.

The Wheeling Steel Corporation was advised by counsel that it need not report for taxation in West Virginia the total of its accounts and notes receivable, and that it should

report only those accounts and notes receivable which were owed to it by residents of West Virginia.

The total amount due to Wheeling Steel Corporation from residents of West Virginia on January 1, 1933, less doubtful and disputed claims estimated at their probable worth, was $72,310, which is the amount reported at Item 6 of the Return.

The amount due to Wheeling Steel Corporation from residents of West Virginia on January 1, 1933, for goods manufactured by the Wheeling Steel Corporation in West Virginia, less doubtful and disputed claims estimated at their probable worth, was $26,296.96.

The amount due to petitioner from residents of West Virginia on January 1, 1933, for goods manufactured by the Wheeling Steel Corporation outside West Virginia and shipped in interstate commerce, less doubtful and disputed claims estimated at their probable worth, was $46,013.04.

Petitioner's Indebtedness on January 1, 1933

On January 1, 1933, the petitioner was indebted to vari-
[fol. 16] ous persons, firms, and corporations in the total sum of $27,740,010.00.

Petitioner Pays to Ohio Taxes on Certain Intangible Property

In order to determine the amount of accounts receivable of a foreign corporation subject to taxation in Ohio, the Ohio statutes provide that current accounts payable shall be deducted from the total of current accounts receivable and prepaid items, and that the result shall be apportioned in accordance with the ratio of current accounts receivable arising from business transacted within Ohio to the total current accounts receivable. Under these Ohio statutes the Wheeling Steel Corporation has been assessed as of January 1, 1933, on accounts and notes receivable amounting to $250,133.42, which amount is included in the total amount of accounts and notes receivable assessed against the Wheeling Steel Corporation by the Assessor of Ohio County and the Tax Commissioner as of January 1, 1933.

State of West Virginia, by —— ——, Attorney General; —— ——, State Tax Commissioner; Wheeling Steel Corporation, by —— ——, Its Attorney.

Judgment Order Entered by the Circuit Court of Ohio County, West Virginia

WEST VIRGINIA:

Be it remembered that at a Circuit Court held for the County of Ohio, at the Court House of said County, on the 5th day of March, 1934, among others the following proceedings were had.

[fol. 17] IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

In the Matter of the Appeal of WHEELING STEEL CORPORATION, a Corporation, from the Assessment of Certain of Its Intangible Property for the Year 1933 by the Assessor of Ohio County, West Virginia, as Corrected by the Tax Commissioner of the State of West Virginia

On Appeal from Assessment

Order

This matter came on to be heard upon the petition of Wheeling Steel Corporation, a corporation, and the exhibits filed thereto and made a part thereof; and further upon the agreed statement of facts hereby made a part of the record in this cause, and upon the following additional facts omitted from or corrections to said agreed statement of facts, but hereby, by agreement of all parties hereto, made a part hereof, the same as if they had been contained in said agreed statement of facts, and all of which were considered by the Court in its determination hereof:

(1) Petitioner is now and was, on January 1, 1933, engaged in the manufacture and sale of steel products.

(2) The place of manufacture of the goods referred to in the petition and agreed statement of facts was also the place of shipment of said goods to the respective purchasers thereof.

(3) The amount of accounts receivable representing indebtedness due petitioner on January 1, 1933, from nonresidents of goods sold and manufactured in and shipped

from West Virginia was Three Hundred Two Thousand One Hundred Dollars and Forty-two cents ($302,100.42).

(4) The amount of accounts receivable due to petitioner on January 1, 1933, from debtors residing in West Virginia for goods sold and manufactured in West Virginia and shipped by petitioners to purchasers, resident in West Virginia, was the sum of Seventy-two Thousand Three Hundred and Ten ($72,310.00) Dollars.

[fol. 18] (5) The total amount of cash in banks and on hand on January 1, 1933, owned by petitioner wherever located was Two Million Three Hundred Seven Thousand Seven Hundred Seventy-three Dollars and Sixty-one Cents ($2,307,773.61) of which the amount of Eight Hundred Forty-nine Thousand One Hundred Sixty-one Dollars and Ninety-nine Cents ($849,161.99) was on deposit in West Virginia, the balance being outside West Virginia.

(6) Of such Eight Hundred Forty-nine Thousand One Hundred Sixty-one Dollars and Ninety-nine Cents ($849,161.09), the amount of Fifty-three Thousand Seventy-two Dollars and Sixty-three Cents ($53,072.63) had been received by petitioner on account of sales of goods sold and manufactured in and shipped from West Virginia to purchasers resident in West Virginia.

(7) Of such Eight Hundred Forty-nine Thousand One Hundred Sixty-one Dollars Ninety-nine Cents ($849,161.99) the amount of Sixty-eight Thousand Six Hundred Twelve Dollars and Twenty-eight Cents ($68,612.28) had been received by petitioner on account of sales of goods sold and manufactured in West Virginia by petitioner but sold and shipped by petitioner to purchasers resident outside of the State of West Virginia.

(8) The balance of said sum of Eight Hundred Forty-nine Thousand One Hundred Sixty-one Dollars and Ninety-nine Cents ($849,161.99) to-wit: Seven Hundred Twenty-seven Thousand Four Hundred Seventy-seven Dollars and Eight Cents ($727,477.08) on deposit in West Virginia banks had been received by petitioner from sales of goods manufactured and shipped by petitioner from points outside of West Virginia.

And upon all other orders and proceedings heretofore entered and had herein, and upon briefs of counsel filed upon behalf of petitioner and on behalf of the County of Ohio, State of West Virginia, and the Magisterial and School Districts of said County of Ohio.

And the matters arising on said arguments having heretofore been submitted to the court for its consideration, [fol. 19] and the court having considered all of said matters and being now advised of its opinion and judgment thereof, is of the opinion that petitioner, Wheeling Steel Corporation, is entitled to the following relief:

(1) The amount of money on hand and on deposit in banks, trust companies, or with any corporation, person or i-dividual, on the 1st day of January, 1933, upon or for which petitioner should be assessed, is the sum of One Hundred Twenty-one Thousand Six Hundred Eighty-four Dollars and Ninety-one Cents ($121,648.91), it being the amount of money on deposit in West Virginia representing the proceeds from sales of goods sold in West Virginia manufactured in West Virginia and shipped to residents and non-residents of West Virginia.

(2) The amount of all notes, book accounts and accounts receivable upon or for which petitioner should be assessed should be Three Hundred Seventy-four Thousand Four Hundred Ten Dollars and Forty-two Cents ($374,410.42), it being the amount due petitioner on account of goods sold and manufactured in and shipped from West Virginia, to residents and non-residents of West Virginia.

It is adjudged, ordered and decreed by the Court that the total amount of money, bonds, credits and investments for which petitioner should be assessed for the year 1933 should be Four Hundred Ninety-six Thousand Ninety-five Dollars and Thirty-three Cents ($496,095.33), for reasons stated in the written opinion handed down in this cause by the Honorable J. H. Brennan, Judge of the Circuit Court of Ohio County, which is hereby filed and made a part of the record in this cause, said opinion being hereby corrected as to the statement of facts therein so as to show the corrections and amendments as hereinbefore in this order made: and that the amount over and above said sum of Four Hundred Ninety-six Thousand Ninety-five Dollars

and Thirty-three Cents ($496,095.33) is not taxable to the said Wheeling Steel Corporation.

And it is further ordered, adjudged and decreed that the [fol. 20] assessment of said property as made by the assessor and corrected by the State Tax Commissioner in the sum of Four Million Four Hundred Ninety-one Thousand Three Hundred Twenty-three Dollars and Sixty-seven Cents ($4,491,323.67) is hereby ordered to be corrected by said Assessor, so that said assessment shall read Four Hundred Ninety-six Thousand Ninety-five Dollars and Thirty-three Cents ($496,095.33), and the balance thereof is held to be non-taxable to Wheeling Steel Corporation.

It is further adjudged, ordered and decreed that the said Wheeling Steel Corporation is not entitled to deduct from the amount of its money, bonds, credits and investments the amount of its indebtedness due and owing January 1, 1933.

It is further adjudged, ordered and decreed that a copy of this order be certified by the Clerk of this Court within twenty days from the entering thereof to the Auditor, Clerk, Sheriff and Assessor of Ohio County.

It is also directed that the Clerk of this Court file this order in the office of the Clerk of the County Court of Ohio County, Tax Commissioner and the Auditor of the State of West Virginia.

And to so much of this order as reduced the assessment as made by the Assessor of Ohio County and State Tax Commissioner from Four Million Four Hundred Ninety-one Thousand Three Hundred Twenty-three Dollars and Sixty-seven Cents ($4,491,323.67) to Four Hundred Ninety-six Thousand Ninety-five Dollars and Thirty-three Cents ($496,095.33), said Assessor, State Tax Commissioner, County Court of Ohio County, Auditor of the State of West Virginia and the State of West Virginia by their respective counsel object and except; and to so much of this order as held Wheeling Steel Corporation not to be entitled to deduct from the amount of its money, bonds, credits and investments, the amount of its debts owing January 1, 1933, said Wheeling Steel Corporation objects and excepts; and likewise said petitioner, Wheeling Steel Corporation, objects and excepts to so much of this order as held pe-

[fol. 21] titioner assessable upon any amount of accounts receivable and bank deposits.

Grounds for Appeal

From the adverse rulings excepting certain properties of the Wheeling Steel Corporation from taxation, your petitioners respectfully seek an appeal. And for grounds of appeal it is respectfully submitted that the Circuit Court of Ohio County erred in the following particulars:

First: The said tribunal erred in finding that the Wheeling Steel Corporation was not entitled to pay taxes on the total cash owned by the Wheeling Steel Corporation in the amount of Two Million, Three Hundred Seven Thousand, Seven Hundred, Seventy-three Dollars and Sixty-one Cents ($2,307,773.61) because this finding is contrary to the law of the State of West Virginia as provided in Chapter 11, Article 3, Section 13 of Michie's 1932 Code and Chapter 11, Article 3, Section 12, 1933 Supplement, Michie's Code.

Second: The said tribunal erred in finding that the Wheeling Steel Corporation was not entitled to pay taxes on Two Million, Forty-six Thousand, Four Hundred, Four Dollars and Twenty-four Cents ($2,046,404.24), being the total amount of the accounts and notes receivable by the Wheeling Steel Corporation because this finding is contrary to the law of the State of West Virginia as provided in Chapter 11, Article 3, Section 13, of Michie's 1932 Code and Chapter 11, Article 3, Section 12, 1933 Supplement, Michie's Code.

Wherefore, Your petitioners pray in accordance with Chapter 11, Article 3, Section 25, of the Official Code of West Virginia, 1931, that an appeal may be granted from said decree and order of the Circuit Court of Ohio County, West Virginia, entered on the 5th day of March, 1934, and that upon a hearing of this cause, said decree and order may be reviewed and reversed and that this Honorable Court enter such decree and order as the Circuit Court of [fol. 22] Ohio County should have entered in fixing the value of the assessments upon which the Wheeling Steel Corporation should pay taxes.

And your petitioners will ever pray, etc.

State of West Virginia, by Homer A. Holt, Attorney-General, and Fred L. Fox, State Tax Commissioner. County of Ohio, by Donald McKee, Prosecuting Attorney of Ohio County, West Virginia, by Wm. C. Piper, First Assistant Prosecuting Attorney of Ohio County, West Virginia. The Board of Education of the County of Ohio, by Donald McKee, Prosecuting Attorney of Ohio County, West Virginia, by Wm. C. Piper, First Assistant Prosecuting Attorney of Ohio County, West Virginia.

STATE OF WEST VIRGINIA, to-wit:

The writ of error prayed for in the foregoing petition was allowed in Court at Charleston, on the 7th day of May, 1934. No bond is required.

Attest: Wm. B. Mathews, Clerk Supreme Court of Appeals.

[fol. 23] [Caption omitted]

IN CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

In the Matter of the Appeal of WHEELING STEEL CORPORATION, a Corporation, from the Assessment of Certain of its Intangible Property by the Assessor of Ohio County, West Virginia, as Corrected by the Tax Commissioner of the State of West Virginia for the Year 1933.

PETITION FOR APPEAL FROM ASSESSMENT—Filed Aug. 26, 1933

To the Honorable Judges of said Court:

I

This is the petition of Wheeling Steel Corporation, a corporation, for an appeal from the assessment made by the [fol. 24] Assessor of Ohio County, as corrected by the Tax Commissioner of the State of West Virginia, upon certain of its intangible properties for the year 1933, brought under the provisions of Chapter 41 of the Acts of the Legislature

of West Virginia, regular session, 1933, being House Bill of 554.

II

Petitioner is a Delaware Corporation with its principal office at 900 Market Street, Wilmington, Delaware, and with its general offices in Wheeling, Ohio County, West Virginia. Its offices were so located on and prior to January 1, 1933, and at all times since that date.

III

Petitioner respectfully shows that in accordance with the law it filed a return with the Assessor of Ohio County, West Virginia, being S.T.C.O. Form No. 3, for the assessment year beginning January 1, 1933, as required by law, copy of which return is filed herewith as Exhibit A and prayed to be read as a part of this petition.

IV

After receipt by the Assessor of said return, the said Assessor raised the amount of Item I under "Money, Bonds, Credits, and Investments" from the amount returned by this petitioner, to-wit, the amount of $312,729.00, to $2,517,450.00, and raised the amount of Item 6 thereof from the amount of $72,310 as returned by this petitioner to $2,446,500 and made a total assessment against your petitioner on account of such Items in the amount of $4,963,950 instead of $385,039 as returned by your petitioner.

V

Petitioner further shows that in its said return it showed indebtedness due from it to various creditors as of Janu- [fol. 25] ary 1, 1933, in the amount of $27,740,010 and claimed a deduction on account thereof from the value of its money, bonds, credits and investments, as returned by it, which deduction said Assessor disallowed.

VI

Petitioner further respectfully shows that pursuant to provisions of Chapter 41 of the Acts of Legislature of West Virginia at the regular session, 1933, being House Bill No.

554, upon ascertaining that the Assessor had proceeded to assess petitioner in the larger amounts as hereinbefore set forth, it filed its objections and protests in writing with the Assessor, a copy of which objections and protests is filed herewith as Exhibit B and prayed to be read and taken as a part of this petition.

VII

Petitioner further shows that the Assessor thereupon determined the questions raised by petitioner in its objections and refused to sustain any part of petitioner's objections and protests and refused to make proper corrections and stated in writing the reasons for his said refusal, which statement is filed herewith as Exhibit C and prayed to be read and taken as a part of this petition.

VIII

Petitioner further respectfully shows that pursuant to said Chapter 41 it requested the said Assessor to certify the questions to the State Tax Commissioner, which the said Assesor thereupon did. Your petitioner and said Assessor furnished to the said Tax Commissioner separate sworn statements of the questions involved, which said sworn statements are filed herewith as Exhibits D and E, respectively, and prayed to be read and taken as a part of this petition.

[fol. 26]

IX

Petitioner further shows that the Tax Commissioner upon receipt of the questions so certified, instructed the said Assessor as to how the property should be treated, issuing to said Assessor certain instructions, copy of which is filed herewith as Exhibit F and prayed to be read and taken as part of this petition.

X

Petitioner further shows that all the proceedings heretofore taken have been taken in compliance with and pursuant to the provisions of said Chapter 41.

XI

Petitioner respectfully shows that it is aggrieved by the assessment made by the said Assessor as corrected by the

said State Tax Commissioner, and as grounds therefor respectfully says as follows:

A. That petitioner is a foreign corporation domiciled in the State of Delaware, under the laws of which State it was incorporated in the year 1920; that it is engaged in the manufacturing of steel products; that it is qualified to do business in the State of West Virginia, holding real and tangible personal property in Brooke, Ohio, Marshall and Mason Counties, West Virginia, and having general offices in Wheeling, Ohio County, West Virginia. Petitioner is further qualified to do and is doing business in the States of Minnesota and Ohio, where it also owns real and tangible personal property, over sixty per cent of all of its real and tangible personal property being situate in said State of Ohio, in which State it manufactures, sells and ships at least seventy-five per cent of all the articles manufactured by it in all States. It has various sales offices situate in various States in the United States.

B. In returning for taxation as hereinbefore set out the Item of $312,729.00 as cash, the amount thereof was returned by petitioner upon advice of counsel and repre- [fol. 27] sented the amount of cash situate in banks located in the State of West Virginia on January 1, 1933, derived from sales by petitioner in West Virginia, said amount being determined from the books of petitioner by allocating to West Virginia so much of its total amount of cash as the amount of sales in West Virginia bore to the total amount of sales in all locations.

C. The amount returned by petitioner under Item 6 of its said return, to-wit, the amount of $72,310.00, was the amount of money less reserve for bad debts due the taxpayer from persons, firms or corporations residents of West Virginia.

D. Petitioner says that on January 1, 1933, the bank deposits in West Virginia banks amounted to $849,161.99, of which all were deposited in Ohio County, West Virginia, banks except the sum of $5,217.96 deposited in a bank in Brooke County, West Virginia; that it had bank deposits in the State of Ohio on said date amounting to $204,733.20; that it had bank deposits located in the State of Pennsylvania on said date amounting to $660,626.25; that it had

bank deposits located in the State of New York on said date amounting to $589,599.04; that it had bank deposits situate in the State of Illinois on said date amounting to $3,653.13. Such deposits represented monies received by petitioner in the operation of its business, excepting as hereinbefore set forth in paragraph B above, from products manufactured by petitioner in the State of Ohio and sold to persons other than residents of the State of West Virginia. Petitioner says that the jurisdiction, if any, to tax all or any of such bank deposits is at the domicile of petitioner in the State of Delaware, and that West Virginia lacks jurisdiction to tax such or any of such bank deposits.

E. That the assessment by the Assessor (and the Tax Commissioner) of petitioner's bank deposits wherever located, is invalid, is an interference with interstate commerce, results in double taxation, is unconstitutional and the taxing thereof is a taking of property without due pro-[fol. 28] cess of law, and contrary to the Constitution of the United States and the Constitution and laws of the State of West Virginia.

XII

Petitioner respectfully shows that the assessment by the Assessor, as corrected by the State Tax Commissioner, of its accounts receivable is invalid and for grounds therefor respectfully shows as follows:

A. That excepting as to the amount returned by petitioner, to-wit, the amount of $72,310.00, said accounts receivable are due from debtors of petitioner resident in states other than West Virginia and representing sales by petitioner to such debtors of goods manufactured outside the State of West Virginia and shipped by petitioner from such outside points to the purchasers thereof likewise resident outside the State of West Virginia.

B. Said accounts receivable, excepting as returned by petitioner, are not taxable in West Virginia and West Virginia has no jurisdiction over the same. Nor does West Virginia have control of said accounts receivable or the persons owing the same to petitioner, or any control of the manufactured articles represented by such accounts as were manufactured in plants located outside the State

of West Virginia and shipped to points outside of such State.

C. The domicile of petitioner being in Delaware, such accounts receivable are intangible personal property and not subject to the jurisdiction of West Virginia.

D. West Virginia having no jurisdiction of said accounts, the assessment and taxing thereof is invalid, is an interference with interstate commerce, and contrary to the Constitution of the United States and the Constitution and laws of the State of West Virginia.

XIII

The assessment by the said Assessor as corrected by the Tax Commissioner of both monies and accounts receivable, [fol. 29] is further invalid for the reason that said Assessor proposes to assess said intangible personal property in Clay District, Ohio County, which is situate in the municipality of the City of Wheeling, Ohio County, West Virginia, and the rate of tax laid thereon will be the rate provided for by Chapter 38 of the Acts of the Legislature of West Virginia, regular session, 1933, being House Bill No. 314, under the provisions whereof a greater rate of tax would be levied upon said property than the rate levied against similar property situate outside of said City of Wheeling, all contrary to the provisions of Section 1, Article 10, of the Constitution of West Virginia, contrary to the provisions of the Constitution of the United States, and is discriminatory, a taking of property without due process of law, and denying to petitioner the equal protection of the law.

XIV

Petitioner further respectfully says that the Assessor and the State Tax Commissioner in refusing to permit petitioner to take the deductions claimed as set forth in its return on account of indebtedness showing as of January, 1933, erred; that the provisions of Chapter 38 of the Acts of Legislature, State of West Virginia, extraordinary session, 1933, passed May 25, 1933, amending Section 12, Article 3, Chapter 11 of the Code of West Virginia, 1931, are invalid.

XV

And for other grounds petitioner says the assessment as made by the said Assessor and as corrected by the Tax Commissioner, is invalid and unconstitutional.

XVI

Petitioner says that the Board of Commissioners of Ohio County sat at a Board of Review and Equalization, and adjourned its hearing as such Board of Review on or about July 31, 1933, and that your petitioner is filing this peti- [fol. 30] tion within thirty days from the time of such adjournment.

Wherefore, petitioner respectfully says that such property is not taxable and the laws with respect thereto are invalid, and therefore prays that an appeal be granted by this Honorable Court, and that the matters be heard de novo by this Honorable Court; that upon such hearing this Court find that the property has been illegally assessed and that such assessment be corrected and that your petitioner be granted such other and further relief to which it may be entitled.

And it will ever pray, etc.

Wheeling Steel Corporation, by Wright Hugus, J. E. Bruce, Its Attorneys. Wright Hugus, J. E. Bruce, Its Attys.

EXHIBIT "A" TO PETITION

S. T. C. O. Form No. 3—Tax Return

To Karl G. Sailer, Assessor of Ohio County:

Annual Tax Return of Wheeling Steel Corporation, a Corporation, for the Assessment Year beginning January 1, 1933.

1. Incorporated under the laws of the State of Delaware.
2. Location of Principal Office Wilmington, Delaware.
3. Location of Chief Place of Business Wheeling, W. Va.

* 5. Authorized Capital Stock $100,000,000.

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* NOTE.—The capital stock reported above is not to be entered in the Personal Property Book.

6. Name and address of President W. W. Holloway, Wheeling, W. Va.

7. Name and address of Secretary H. P. Beswick, Wheeling, W. Va.

[fol. 31] This is a Foreign Corporation authorized by law to do business in West Virginia.

Tangible Personal Property

14. Store Goods and Merchandise—inventory val.	
15. Store Fixtures and Equipment.	
16. Office Furniture, Fixtures and Equipment.	
Amount carried forward to next column $84600	84600
Amount brought forward	$84600
31. Manufactured articles on hand	22300
32. All articles purchased, received or otherwise held for the purpose of being used in whole or in part in any process or operation of manufacturing, combining, rectifying, or refining	24800
Total value of Tangible Personal property	$131700

Money, Bonds, Credits and Investments

	Value by Company Whole Dollars
1. The amount of money on hand, and all deposits in banks, trust companies, or with any corporation, firm or individual, in this or any other state or country, on the first day of January	$312729
6. Amount of all notes, book accounts and accounts receivable not secured by mortgage whether debtors reside in West Virginia or elsewhere	72310
Total amount of money, bonds, credits and investments (Except U. S. Government Bonds)	$385039

[fol. 32] * Debts Owing January First—Deduction Claimed

(Indebtedness Must be Itemized)

To whom owing, American Rolling Mill Co.
Form of Debt, Note.
Date of Debt, 1-1-30.
Date Note Due, 1-1-34.
Amount, $250000.
Miscellaneous Accounts Payable $249010.
4½% and 5½% Bonds outstanding in hands of public $27241000.
Total $27740010.

* NOTE.—Debts must be bona fide and owing on January first, and are deductible only from money, bonds, credits and investments.

STATE OF WEST VIRGINIA,
County of Ohio, to-wit:

I, H. P. Beswick, Secretary of the Wheeling Steel Corporation, do solemnly swear (or affirm) that the foregoing is, to the best of my knowledge and judgment, true in all respects; that it contains a statement of all the real estate and personal property, including moneys, leaseholds, credits and investments belonging to said corporation; that the valuation affixed to such property is, in my opinion, its true and actual value, by which I mean the price at which it would sell if voluntarily offered for sale on such terms as are usually employed in selling such property, and not the price which might be realized at a forced or auction sale; and that said corporation has not, to my knowledge, since the first day of the assessment year, converted any of its assets into non-taxable securities for the purpose of evading the assessment of taxes thereon; so help me God.

—— ——.

[fol. 33] Subscribed and sworn to before me this 16th day of May, 1933. —— ——, Notary Public.

EXHIBIT "B" TO PETITION

To the Honorable Karl G. Sailer, Assessor of Ohio County, West Virginia:

Wheeling Steel Corporation, a corporation, hereby objects to and protests against the assessment by you of certain items appearing in this corporation's tax return for the year 1933 and being Items 1 and 6 of such return, wherein you raised the valuation of Item 1 "Cash * * *" from the valuation of $312,729 as reported by the undersigned to $2,517,450 and also raised Item 6 "Accounts Receivable * * *" from the valuation of $72,310, as reported by the undersigned, to $2,446,500. Taxpayer's objections to and protests against the re-valuation are based upon the following:

I

The amount of cash ($312,729) returned by taxpayer was the amount of cash in banks situate on January 1, 1933, in West Virginia, derived from West Virginia business upon an allocation-of-business basis. The amount assessed for this item by the Assessor ($2,517,450) includes cash on deposit to the credit of taxpayer, or its subsidiaries, in banks situate outside the State of West Virginia. In assessing this additional amount against taxpayer, the Assessor is including the following items of cash belonging to the Companies indicated and deposited as indicated, all as follows:

(a) Luzerne Mercantile Company, a Pennsylvania Corporation, with its principal place of business in Harmarville, Allegheny County, Pennsylvania, doing business in Brooke County, West Virginia, but not in Ohio County. On January 1, 1933, this Company had a total of $14,353.09 in cash, of which $12,522.83 was on deposit in Ohio County, [fol. 34] West Virginia, and the balance was on deposit outside of Ohio County. Said Luzerne Mercantile Company reported to the Assessor of Brooke County, West Virginia, of such total sum, the sum of $4,421.00 as being taxable in Brooke County. The balance of said cash was derived from business outside of West Virginia.

(b) Said amount assessed by the Assessor against taxpayer included the sum of $21,541.52 belonging to Wheel-

ing Steel Corporation of Texas, a Texas corporation, with its principal place of business in Texas. This sum was on deposit in banks in Ohio County, West Virginia, to the credit of said Wheeling Steel Corporation of Texas.

(c) Said total sum likewise included the sum of $22,694.67 belonging to Wheeling Steel Corporation of Tennessee, a Tennessee Corporation, with its principal place of business in Memphis, Tennessee. This sum was on deposit to the credit of said Wheeling Steel Corporation of Tennessee in Ohio County, West Virginia, banks.

(d) Said sum also included the sum of $4,053.74 belonging to the Consumers Mining Company, a Pennsylvania Corporation, with its principal place of business in Harmarville, Allegheny County, Pennsylvania. All of said sum was on deposit in a bank or banks in Pittsburgh, Pennsylvania.

(e) Said sum also included the sum of $733.34 belonging to the Benwood & Wheeling Connecting Railway Company, a West Virginia Corporation, with its principal office in Marshall County, West Virginia. Said sum was on deposit to the credit of said Benwood & Wheeling Connecting Railway Company in banks in Ohio County, West Virginia, but said corporation being a railroad company, is required to make a return of its properties for assessment purposes direct to the State of West Virginia.

(f) Said sum likewise included the amount of $2812.60 belonging to Expanded Metal Products, Inc., a New York Corporation, doing business solely in New York, in which state said sum was deposited in banks.

[fol. 35] (g) Said sum likewise included the amount of $5520.07, the property of Fabricated Steel Products Company, a West Virginia Corporation, with its principal office in Marshall County, West Virginia, to the Assessor of which County said Company reported its cash subject to taxation. Said sum was deposited in banks in Ohio County, West Virginia.

(h) Said sum likewise included the amount of $281.61 being a special fund to the credit of Trustees and Sinking Fund Agents under a mortgage of taxpayer and on deposit in New York City, New York.

II

The bank deposits of taxpayer as of January 1, 1933, were as follows: In Ohio County, West Virginia, Banks: $849,161.99. Banks situate in the State of Ohio: $204,-733.20. Banks situate in the State of Pennsylvania: $660,-626.55. Banks situate in the State of New York: $589,-599.04. Banks situate in the State of Illinois: $3,653.13. Of the amount on deposit in West Virginia banks, taxpayer in its return reported such amount as had been received from and allocated upon business carried on in West Virginia, it being advised by counsel so to report. The balance of said cash deposited in West Virginia banks was derived from and allocated upon the basis for business done outside of West Virginia.

III

The item of Accounts Receivable, $72,310 as returned by the taxpayer was the amount, less bad debts, due the taxpayer from persons, firms or corporations residents of West Virginia. The Assessor's valuation of $2,446,500, less bad debts, included the following amounts which were due to subsidiaries of taxpayer, all as follows:

(a) The amount of $8,637.18 due the Luzerne Mercantile Company, a Pennsylvania Corporation, doing business in Brooke County, West Virginia. Of this amount $6,900 was reported to the Assessor of Brooke County, West Virginia, [fol. 36] by said Luzerne Mercantile Company. The balance of said accounts was due from persons other than residents of West Virginia from business transacted outside the State of West Virginia and said Luzerne Mercantile Company was advised that it was not required to report the same.

(b) The amount of $17,168.38 due the Tyler Tube & Pipe Company, a Pennsylvania Corporation, not doing business in West Virginia.

(c) The amount of $958.17 due the Benwood & Wheeling Connecting Railway Company, doing business in Marshall County, West Virginia, the tax return thereof being required under law to be otherwise made.

(d) The amount of $19,167.99 due the Consumers Mining Company, a Pennsylvania Corporation, doing business

solely in Harmarville, Allegheny County, Pennsylvania, and Pike County, Ky.

(e) The amount of $129,858.35 due the Wheeling Steel Corporation of Tennessee, a Tennessee Corporation, doing business solely at Memphis, Tennessee, or in interstate commerce.

(f) The amount of $33,061.24 due the Wheeling Steel Corporation of Texas, a Texas Corporation, doing business solely in the State of Texas, or in interstate commerce.

(g) The amount of $8,934.54 due the Fabricated Steel Products Company, a West Virginia Corporation, doing business in Marshall County. Of this amount said Fabricated Steel Products Company returned $7,185 to the Assessor of Marshall County as being taxable. The balance thereof the said Company had allowed for bad debts.

(h) The amount of $5,798.07 due the Expanded Steel Products, Inc., a New York Corporation, doing business solely in New York City.

(i) The amount of $21,200 deposited by Wheeling Corrugating Company, a subsidiary of taxpayer, to the credit of individuals in states other than West Virginia.

(j) The amount of $155,311 which is the amount of ad-[fol. 37] vance payments made by taxpayer to owners and sellers of iron ore for the purchase of iron ore, the delivery of which had not been as yet received on January 1, 1933. The taxpayer was advised that this was not taxable property situate in West Virginia. It represented no account receivable of any person, taxpayer having the right under its contract with said sellers of ore, to receive under the terms of the contract, iron ore.

(k) The amount of $59,676 which was the amount due from employees of taxpayer for capital stock of taxpayer sold to its employees under a stock subscription plan, prior to January 1, 1933.

IV

The balance of the Assessor's valuation of Accounts Receivable, represents amounts due for goods manufactured by taxpayer in States other than West Virginia and shipped to taxpayer's customers living in places not situ-

ate in West Virginia. Taxpayer in making its return was advised by counsel that such accounts receivable need not be reported as they were not properly taxable in Ohio County, West Virginia, and reported only such amounts as were due from West Virginia customers as hereinbefore set forth.

V

Taxpayer is a Delaware Corporation, with its principal office in Wilmington, Delaware, having a business office in Wheeling, West Virginia, in which State it is qualified to do business as a foreign corporation. It makes all reports and returns required by the State of Delaware for a corporation domesticated in that State. It has manufacturing plants situate in Ohio and West Virginia, the larger number of which is situate in the State of Ohio. It has various sales offices located throughout the United States, the larger part of its goods being shipped in interstate commerce.

[fol. 38] In view of the matters hereinbefore set forth, taxpayer objects to and protests against the assessment and valuation made and fixed by the Assessor and assigns, among other, the following reasons therefor:

1. Taxpayer is domiciled in Delaware. Bank accounts and accounts receivable are intangible personal property, having a situs at the domicile of the owner, which in this case is Delaware.

2. Bank accounts located in points outside of West Virginia have no situs in West Virginia and West Virginia lacks jurisdiction to assess and tax such bank deposits. As to accounts in West Virginia, taxpayer protests against any assessment thereof on the ground that their situs is also at the domicile of corporation in Delaware.

3. The accounts receivable representing goods manufactured in plants other than those in West Virginia and shipped to points other than those in West Virginia, have no situs in West Virginia for taxation purposes and West Virginia has no jurisdiction over the same. Their *suits* is at the domicile of the corporation—Delaware.

4. West Virginia has neither jurisdiction nor control of the accounts receivable from persons living outside of West Virginia (nor does it have jurisdiction or control in

any way of so much of the manufactured articles represented by the accounts receivable as were manufactured in plants located outside West Virginia and shipped to points outside of West Virginia). Nor as to such accounts does the State of West Virginia have jurisdiction over the debtors by whom such accounts are owed.

5. In so far as the Assessor has included accounts receivable representing shipments from, and to, points outside of West Virginia, the assessment of such accounts is an interference with inter-state commerce and prohibited by the Constitution of the United States.

6. The attempted assessment and taxation of the bank accounts and accounts receivable located outside of West Virginia would result in double taxation.

[fol. 39] 7. Provisions of the law attempting to tax such intangible property of a corporation are unconstitutional and the taxing thereof is an interference with inter-state commerce, results in double taxation, ignores the general provision of the law with reference to the situs of property for taxation, is otherwise invalid, unconstitutional, is a taking of property without due process of law, and contrary to the constitution of the United States and amendments thereof.

8. Taxpayer with an indebtedness as of January 1, 1933, far in excess of the value of its intangible properties both as reported by it and as fixed by the Assessor, should be permitted to set off such indebtedness against its intangible property as provided in Section 12 of Article 3, Chapter 11 of the 1931 Code of West Virginia.

9. The provisions of an Act of the Legislature, being House Bill No. 314 passed at the 1933 Session of the State Legislature providing for a rate of tax on "money * * * and accounts receivable" owned by taxpayer resident in municipalities greater than the rate on the same class of property situate outside of municipalities, is invalid, discriminatory and unconstitutional, and is taking of property without due process of law, and contrary to the constitution of the United States and amendments thereto.

These objections and protests are filed under the provisions of Section 24(a) of an Act of the Legislature, being

House Bill No. 554 passed at the 1933 session of the State Legislature, relating to the Review of Assessments.

Respectfully submitted, Wheeling Steel Corporation, by R. D. Swinburne, Comptroller.

EXHIBITS "C" AND "E" TO PETITION

July 14, 1933.

Wheeling Steel Corporation, Wheeling, West Virginia.

[fol. 40] GENTLEMEN:

In answer to the Objections and Protests of the Wheeling Steel Corporation, filed with this office, on the 12th day of July, 1933:

It is the opinion of this department, that the Objections noted in Section 1, Paragraphs A, B, C, D, E, F, G and H in Section 2, with reference to the amount of cash on deposit in banks in this state and other states, for which this office assessed the Wheeling Steel Corporation $2,380,300.00, said Protest should be and is hereby disallowed for the reason that this cash is subject to the Corporation's checks and drafts and is a proper item for taxation in this state; giving as our authority, Section 12, Article 3, Chapter 11, of the 1931 Official Code of the State of West Virginia.

It is the opinion of this department that section 3, paragraphs A, B, C, D, E, F, G, H and I, of your Protest, should be and is hereby disallowed for the reason that said Accounts Receivable as assessed by our department in the amount of $2,399,000.00, are included as an asset of the Wheeling Steel Corporation and are so indicated in the 13th annual report of the Wheeling Steel Corporation, for the fiscal year ended December 31, 1932; citing our authority in Section 12, Article 3, Chapter 11, of the Official Code of West Virginia, 1931.

The objections set forth in Section 3, Paragraph J, protesting against the assessment in the amount of $155,311, as made by this department, should be and are hereby disallowed for the reason that this item is an asset of the Corporation and is so indicated in the 13th Annual Report of

the Wheeling Steel Corporation, for the fiscal year ended December 31, 1932; citing as our authority Section 12, Article 3, Chapter 11, of the Official Code of the State of West Virginia, 1931.

The Objection set forth in Section 3, Paragraph K, against the assessment as made by this department in the amount of $59,676.99, for an account due from employees, under the stock purchase plan, should be and is hereby [fol. 41] disallowed for the reason that this amount is an asset of the Corporation and is so indicated in the 13th Annual Report of the Wheeling Steel Corporation, for the fiscal period ended December 31, 1932; citing as our authority, Section 12, Article 3, Chapter 11, of the Official Code of West Virginia, 1931.

With reference to the protest set forth in Section 4, in regard to the balance of the assessed valuation of Accounts Receivable, as made by this department, the protest should be and is hereby disallowed for the reason that said Accounts Receivable are a part of the assets of the Wheeling Steel Corporation and are so indicated and set forth in the 13th Annual Report of the Wheeling Steel Corporation, for the fiscal period ended December 31, 1932; citing as our authority Secti-n 12, Article 3, Chapter 11, of the Official Code of West Virginia, 1931.

With reference to the Protest in Section 5, Paragraphs 1, 2, 3, 4, 5, 6 and 7, this department is of the opinion that the Wheeling Steel Corporation has its chief place of business in the City of Wheeling, State of West Virginia, and is required by law to make its return of tangible and intangible property to the Assessor at Ohio County, Wheeling, West Virginia; for this reason said Protest should be and is hereby disallowed citing as our authority, Section 12, Article 3, Chapter 11, of the Official Code of the State of West Virginia, 1931.

With reference to the protest set forth in Section 5, Paragraph 8, this department is of the opinion, that Corporations are not entitled to deductions on account of indebtedness, as against their intangible assets, under the laws that now exist. The statute permitting deductions under the 1931 Code was Section 6, Article 5, Chapter 11, and this section having been entirely omitted from House Bill No. 408, there is clearly no right to deductions on the part of Corporations.

With reference to the Protest set forth in Section 5, Paragraph 9, this department is of the opinion that this [fol. 42] Protest is in error wherein the Protest, it is assumed that the rate of tax on moneys and accounts receivable owned by Taxpayer Residents in Municipalities is greater than the rate on the same class of property situated outside of Municipalities, but in the event that this department's opinion should be wrong with reference to this question and the Petitioner's opinion right this department still maintains that said Protest should be and hereby is disallowed, for the reason that House Bill No. 314 is an Act of the Legislature of 1933 Session and this office is guided in accordance with such acts.

Be it more clearly understood that all Objections and Protests set forth in the Petition of the Wheeling Steel Corporation should be and are hereby disallowed.

Respectfully submitted, (Signed) Karl G. Sailer, Assessor of Ohio County.

Subscribed and sworn to before me this 19th day of July 1933. (Signed) A. B. Creighton, Notary Public in and for Ohio County, W. Va. My Commission Expires March 28, 1933.

EXHIBIT "D" TO PETITION

Statement of Taxpayer, Wheeling Steel Corporation, under Section 24 (a)

To the Honorable Karl G. Sailer, Assessor of Ohio County, West Virginia:

Wheeling Steel Corporation, a corporation, hereby objects to and protests against the assessment by you of certain items appearing in this corporation's tax return for the year 1933 and being Items 1 and 6 of such return, wherein you raised the valuation of Item 1 "Cash * * *" [fol. 43] from the valuation of $312,729 as reported by the undersigned to $2,517,450 and also raised Item 6 "Accounts Receivable * * *" from the valuation of $72,310, as reported by the undersigned, to $2,446,500. Taxpayer's objections — — protests against the revaluation are based upon the following:

I

The amount of cash ($312,729) returned by taxpayer was the amount of cash in banks situate on January 1, 1933, in West Virginia, derived from West Virginia business upon an allocation-of-business basis. The amount assessed for this item by the Assessor ($2,517,450) includes cash on deposit to the credit of taxpayer, or its subsidiaries, in bank situate outside the State of West Virginia. In assessing this additional amount against taxpayer, the Assessor is including the following items of cash belonging to the Companies indicated and deposited as indicated, all as follows:

(a) Luzerne Mercantile Company, a Pennsylvania Corporation, with its principal place of business in Harmarville, Allegheny County, Pennsylvania, doing business in Brooke County, West Virginia, but not in Ohio County. On January 1, 1933, this Company had a total of $14,353.09 in cash, of which $12,522.83 was on deposit in Ohio County, West Virginia, and the balance was on deposit outside of Ohio County. Said Luzerne Mercantile Company reported to the Assessor of Brooke County, West Virginia, of such total sum, the sum of $4,421.00 as being taxable in Brooke County. The balance of said cash was derived from business outside of West Virginia.

(b) Said amount assessed by the Assessor against taxpayer included the sum of $21,541.52 belonging to Wheeling Steel Corporation of Texas, a Texas corporation, with its principal place of business in Texas. This sum was on [fol. 44] deposit in banks in Ohio County, West Virginia, to the credit of said Wheeling Steel Corporation of Texas.

(c) Said total sum likewise included the sum of $22,694.67 belonging to Wheeling Steel Corporation of Tennessee, a Tennessee Corporation, with its principal place of business in Memphis, Tennessee. This sum was on deposit to the credit of said Wheeling Steel Corporation of Tennessee in Ohio County, West Virginia, banks.

(d) Said sum also included the sum of $4,053.74 belonging to the Consumers Mining Company, a Pennsylvania Corporation, with its principal place of business in Harmarville, Allegheny County, Pennsylvania. All of said sum

was on deposit in a bank or banks in Pittsburgh, Pennsylvania.

(e) Said sum also included the sum of $733.34 belonging to the Benwood & Wheeling Connecting Railway Company, a West Virginia Corporation, with its principal office in Marshall County, West Virginia. Said sum was on deposit to the credit of said Benwood & Wheeling Connecting Railway Company in banks in Ohio County, West Virginia, but said corporation being a railroad company, is required to make a return of its properties for assessment purposes direct to the State of West Virginia.

(f) Said sum likewise included the amount of $2,812.60 belonging to Expanded Metal Products, Inc., a New York Corporation, doing business solely in New York, in which state said sum was deposited in banks.

(g) Said sum likewise included the amount of $5,520.07, the property of Fabricated Steel Products Company, a West Virginia Corporation, with its principal office in Marshall County, West Virginia, to the Assessor of which County said Company reported its cash subject to taxation. Said sum was deposited in banks in Ohio County, West Virginia.

(h) Said sum likewise included the amount of $281.61 being a special fund to the credit of Trustees and Sinking [fol. 45] Fund Agents under a mortgage of taxpayer and on deposit in New York City, New York.

II

The bank deposits of taxpayer as of January 1, 1933, were as follows: In Ohio County, West Virginia, Banks: $849,161.99. Banks situate in the State of Ohio: $204,733.20. Banks situate in the State of Pennsylvania: $600,625.25. Banks situate in the State of New York: $589,599.04. Banks situate in the State of Illinois: $3,653.13. Of the amount on deposit in West Virginia banks, taxpayer in its return reported such amount as had been received from and allocated upon business carried on in West Virginia, it being advised by counsel so to report. The balance of said cash deposited in West Virginia banks was derived from and allocated upon the basis for business done outside of West Virginia.

III

The item of Accounts Receivable, $72,310 as returned by the taxpayer was the amount, less bad debts, due the taxpayer from persons, firms or corporations residents of West Virginia. The Assessor's valuation of $2,446,500, less bad debts, included the following amounts which were due to subsidiaries of taxpayer, all as follows:

(a) The amount of $8,637.18 due the Luzerne Mercantile Company, a Pennsylvania Corporation, doing business in Brooke County, West Virginia. Of this amount $6,900 was reported to the Assessor of Brooke County, West Virginia, by said Luzerne Mercantile Company. The balance of said accounts was due from persons other than residents of West Virginia from business transacted outside the State of West Virginia and said Luzerne Mercantile Company was advised that it was not required to report the same.

(b) The amount of $17,168.38 due the Tyler Tube & Pipe Company, a Pennsylvania Corporation, not doing business in West Virginia.

(c) The amount of $958.17 due the Benwood & Wheel-[fol. 46] ing Connecting Railway Company, doing business in Marshall County, West Virginia, the tax return thereof being required under law to be otherwise made.

(d) The amount of $19,167.99 due the Consumers Mining Company, a Pennsylvania Corporation, doing business solely in Harmarville, Allegheny County, Pennsylvania, and Pike County, Ky.

(e) The amount of $129,858.35 due the Wheeling Steel Corporation of Tennessee, a Tennessee Corporation, doing business solely at Memphis, Tennessee, or in interstate commerce.

(f) The amount of $33,061.24 due the Wheeling Steel Corporation of Texas, a Texas Corporation, doing business solely in the State of Texas, or in interstate commerce.

(g) The amount of $8,934.54 due the Fabricated Steel Products Company, a West Virginia Corporation, doing business in Marshall County. Of this amount said Fab-

ricated Steel Products Company returned $7,185 to the Assessor of Marshall County as being taxable. The balance thereof the said Company had allowed for bad debts.

(h) The amount of $5,798.07 due the Expanded Steel Products, Inc., a New York Corporation, doing business solely in New York City.

(i) The amount of $21,200 deposited by Wheeling Corrugating Company, a subsidiary of taxpayer, to the credit of individuals in states other than West Virginia.

(j) The amount of $155,311 which is the amount of advance payments made by taxpayer to owners and sellers of iron ore for the purchase of iron ore, the delivery of which had not been as yet received on January 1, 1933. The taxpayer was advised that this was not taxable property situate in West Virginia. It represented no account receivable of any person, taxpayer having the right under its contract with said sellers of ore, to receive under the terms of the contract, iron ore.

(k) The amount of $59,676 which was the amount due [fol. 47] from employees of taxpayer for capital stock of taxpayer sold to its employees under a stock subscription plan, prior to January 1, 1933.

IV

The balance of the Assessor's valuation of Accounts Receivable, represents amounts due for goods manufactured by taxpayer in States other than West Virginia and shipped to taxpayer's customers living in places not situate in West Virginia. Taxpayer in making its return was advised by counsel that such accounts receivable need not be reported as they were not properly taxable in Ohio County, West Virginia, and reported only such amounts as were due from West Virginia customers as hereinbefore set forth.

V

Taxpayer is a Delaware Corporation, with its principal office in Wilmington, Delaware, having a business office in Wheeling, West Virginia, in which State it is qualified to do business as a foreign corporation. It makes all reports and returns required by the State of Delaware for

a corporation domesticated in that State. It has manufacturing plants situate in Ohio and West Virginia, the larger number of which is situate in the State of Ohio. It has various sales offices located throughout the United States, the larger part of its goods being shipped in interstate commerce.

In view of the matters hereinbefore set forth, taxpayer objects to and protests against the assessment and valuation made and fixed by the Assessor and assigns, among other, the following reasons therefor:

1. Taxpayer is domiciled in Delaware. Bank accounts and accounts receivable are intangible personal property, having a situs at the domicile of the owner, which in this case is Delaware.

2. Bank accounts located in points outside of West Virginia have no situs in West Virginia and West Virginia [fol. 48] lacks jurisdiction to assess and tax such bank deposits. As to accounts in West Virginia, taxpayer protests against any assessment thereof on the ground that their situs is also at the domicile of corporation in Delaware.

3. The accounts receivable representing goods manufactured in plants other than those in West Virginia and shipped to points other than those in West Virginia, have no situs in West Virginia for taxation purposes and West Virginia has no jurisdiction over the same. Their suits is at the domicile of the corporation—Delaware.

4. West Virginia has neither jurisdiction nor control of the accounts receivable from persons living outside of West Virginia (nor does it have jurisdiction or control in any way of so much of the manufactured articles represented by the accounts receivable as were manufactured in plants located outside West Virginia and shipped to points outside of West Virginia). Nor as to such accounts does the State of West Virginia have jurisdiction over the debtors by whom such accounts are owed.

5. In so far as the Assessor has included accounts receivable representing shipments from, and to, points outside of West Virginia, the assessment of such accounts is an interference with inter-state commerce and prohibited by the Constitution of the United States.

6. The attempted assessment and taxation of the bank accounts and accounts receivable located outside of West Virginia would result in double taxation.

7. Provisions of the law attempting to tax such intangible property of a corporation are unconstitutional and the taxing thereof is an interference with inter-state commerce, results in double taxation, ignores the general provision of the law with reference to the situs of property for taxation, is otherwise invalid, unconstitutional, is a taking of property without due process of law, and contrary to the constitution of the United States and amendments thereof.

8. Taxpayer with an indebtedness as of January 1, 1933, [fol. 49] far in excess of the value of its intangible properties both as reported by it and as fixed by the Assessor, should be permitted to set off such indebtedness against its intangible property as provided in Section 12 of Article 3, Chapter 11 of the 1931 Code of West Virginia.

9. The provisions of an Act of the Legislature, being House Bill No. 314 passed at the 1933 Session of the State Legislature providing for a rate of tax on "money . . . and accounts receivable" owned by taxpayer resident in municipalities greater than the rate on the same class of property situate outside of municipalities, is invalid, discriminatory and unconstitutional, and is a taking of property without due process of law, and contrary to the constitution of the United States and amendments thereto.

These objections and protests are filed under the provisions of Section 24(a) of an Act of the Legislature, being House Bill No. 554 passed at the 1933 session of the State Legislature, relating to the Review of Assessments.

Respectfully submitted, Wheeling Steel Corporation,
by R. D. Swinburne, Comptroller.

STATE OF WEST VIRGINIA,
County of Ohio, ss:

Before me, J. E. Bruce, a Notary Public of the said County of Ohio, personally appeared R. D. Swinburne, who, being by me first duly sworn, says: that he is Comptroller of Wheeling Steel Corporation, the protestants in the foregoing objections and protests; that the facts and allegations therein contained are true.

R. D. SWINBURNE.

Taken, sworn to and subscribed before me this 24th day of July, 1933. J. E. Bruce, Notary Public. My Commission expires March 13, 1935.

[fol. 50] EXHIBIT "F" TO PETITION.

In the matter of the Application of WHEELING STEEL CORPORATION to be Exempted from the Payment of Taxes on Certain Intangible Personal Properties Assessed in its Name by the Assessor of Ohio County.

On this 31st day of July, 1933, there has been filed before the undersigned Fred L. Fox, State Tax Commissioner of the State of West Virginia, the objection of the Wheeling Steel Corporation to the assessment of certain of its intangible personal property as fixed by the Assessor of Ohio County, and it is asked that such property be held to be exempted from taxation on the various grounds set out in its objection hereto; and there is also filed the objection of Karl G. Sailer, Assessor of Ohio County, to the request of Wheeling Steel Corporation aforesaid. The objection of the said Wheeling Steel Corporation and the answer thereto filed by the said Karl G. Sailer, Assessor, are supported by affidavits as required by law.

The question of the assessment of the said property submitted to the undersigned comes under the provisions of Section 24(a), Article 3, Chapter 11, of the Code, as enacted by House Bill 554 at the regular session of the Legislature of West Virginia, 1933.

On consideration of the objection filed by the said Wheeling Steel Corporation to the assessment of its property, the answer and objection of the Assessor of Ohio County thereto, upon all the papers filed with the said papers and affidavits, it is held that the sum of $14,353.09 in the name of the Luzerne Mercantile Company, the sum of $21,541.52 deposited in the name of the Wheeling Steel Corporation of Texas, a Texas corporation, the sum of $32,694.60 deposited in the name of the Wheeling Steel Corporation of Tennessee, a Tennessee corporation, the sum of $4,053.74 deposited in the name of Consumers Mining Company of Pennsylvania, a corporation, the sum of $733.34 deposited in the name of the Benwood and Wheeling Connecting Railway

[fol. 51] Company, the sum of $2,812.60 deposited in the name of the Expanded Metal Products Company of New York, the sum of $5,520.07 deposited in the name of the Fabricated Steel Products Corporation, a corporation, the sum of $821.61 deposited to the credit of trustees in the sinking fund of New York, representing cash included in the total assessment of $2,517,540.00, should be deducted from the amount of said assessment; and the said Wheeling Steel Corporation be assessed with the balance of cash held by it on the first day of January, 1933, wheresoever deposited.

It is further held that the assessment of $2,446,600.00 as accounts receivable, should be reduced in the following amounts, to-wit: the sum of $8767.18 due Luzerne Mercantile Company, the sum of $17,168.30 due the Tyler Tube and Pipe Company of Pennsylvania, a corporation, the sum of $958.17 due the Benwood and Wheeling Connecting Railway, the sum of $19,167.99 due the Consumers Mining Company of Pennsylvania, a corporation, the sum of $129,858.35 due the Wheeling Steel Corporation of Tennessee, a Tennessee Corporation, the sum of $33,061.24 due Wheeling Steel Corporation of Texas, a Texas Corporation, the sum of $8,934.54 due Fabricated Steel Products Company, the sum of $5798.07 due Expanded Steel Products of New York, a New York corporation, the sum of $21,200.00 deposited in the name of Wheeling Corrugating Company, in various banks located outside of West Virginia, the sum of $155,311.00 carried on the books as an account receivable, but in fact representing monies paid on tangible property located without the State of West Virginia; and the residue of said sum of $2,446,500.00 assessed to the said Wheeling Steel Corporation as Class 1 property, as defined by the constitution and statutes of the state.

It is further held that said Wheeling Steel Corporation is not entitled to deduct any sum of assessment herein held to be legal on account of any of its indebtedness existing on the first day of January, 1933.

[fol. 52] Given under my hand this 31st day of July, 1933.

—— ——, State Tax Commissioner.

To Karl G. Sailer, Assessor of Ohio County, Wheeling, West Virginia.

[File endorsement omitted]

IN CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

In the Matter of the Appeal of WHEELING STEEL CORPORATION, a Corporation, from the Assessment of Certain of its Intangible Property by the Assessor of Ohio County, West Virginia, as Corrected by the Tax Commissioner of the State of West Virginia for the year 1933.

ORDER ALLOWING APPEAL, ETC.

On this 29th day of August, 1933, came Petitioner, Wheeling Steel Corporation, by Wright Hugus and J. E. Bruce, its attorneys, and it appearing that said Wheeling Steel Corporation had heretofore, to-wit, on the 26th day of August, 1933, filed its petition and accompanying exhibits for an appeal in the above matter with the Clerk of this Court, and it appearing that there are no objections to the filing of the same, it is hereby adjudged, or- [fol. 53] dered and decreed that said application be and it hereby is filed.

And it is further adjudged, ordered and decreed that said appeal be and it is hereby allowed.

Upon motion of said Petitioner, said application is now ordered to be docketed in this Court for hearing on the 11th day of September, 1933, at the next regular term of this Court.

It is further ordered that ten days notice of the hearing of said application shall be given to the Prosecuting Attorney of Ohio County, Wheeling, West Virginia, who shall give at least five days notice thereof to the State Tax Commissioner.

It is further ordered that service of a certified copy of this order upon the Prosecuting Attorney of Ohio County, West Virginia, at least ten days before the 11th day of September, 1933, shall be sufficient notice of the hearing of said application.

Given under my hand this 29th day of August, 1933.

J. B. Sommerville, Judge of the Circuit Court of Ohio County, West Virginia.

The clerk will please enter the above as a vacation order.

J. B. Sommerville, Judge, &c.

IN CIRCUIT COURT OF OHIO

ORDER TRANSFERRING CASE—Oct. 30, 1933

In the Matter of the WHEELING STEEL CORPORATION, a Corp., for Correction

Appeal from Ruling of Assessor

For reasons appearing to the Court, this case is by the Court transferred to Part I of this Court.

[fol. 54] IN CIRCUIT COURT OF OHIO COUNTY

In the Matter of the Appeal of WHEELING STEEL CORPORATION, a Corporation, from the Assessment of Certain of its Intangible Property for the Year 1933 by the Assessor of Ohio County, West Virginia, as Corrected by the Tax Commissioner of the State of West Virginia

ORDER OF SUBMISSION—NOV. 27, 1933

On this 27th day of November, 1933, came the petitioner, Wheeling Steel Corporation, by J. E. Bruce and Wright Hugus, its attorneys, and as well came the State of West Virginia, County of Ohio, West Virginia, and the magisterial districts of said County by Donald A. McKee, Prosecuting Attorney of said County, and thereupon said parties tendered for filing an agreed statement of facts in this cause (parties not signing said statement herein in open Court, adopting the same as and for their own and each thereof), and agreed that the matters herein in controversy should be determined upon said statement of facts, being agreed by said parties that if witnesses were called by the respective parties, that said facts as set out in said statement would be testified to by the various witnesses called; and the parties hereto, by counsel, reserve the right to except to the materiality of any or all of the facts set out in said agreed statement of facts, and no party, by agreeing to said statement, waives any objection which might be interposed to the relevancy or materiality thereof.

And thereupon, upon joint motion of all of such parties, it is hereby adjudged, ordered and decreed that said agreed

statement of facts be, and it hereby is filed herein and the matters arising herein in this cause be and they are submitted thereon.

It is further adjudged, ordered and decreed that the taxpayer, the petitioner herein, Wheeling Steel Corporation, be given until December 1, 1933, to file a written brief upon its behalf, and that the other parties hereto be allowed ten [fols. 55-69] days from the time of the filing of said brief, to file a reply thereto; and further, that if said Wheeling Steel Corporation desires to answer said reply, it shall have given — days thereafter within which to file the same.

Agreed Statement of Facts

It is hereby agreed by and between the petitioner, Wheeling Steel Corporation, and the respondent, the State of West Virginia, that the following facts may be used in connection with the petition and exhibits filed in the above proceeding, the same as if said facts had been adduced as evidence upon hearing de novo before this Court as provided by statute, and the matter submittted thereon.

Agreed statement of facts omitted. Printed side page 2, ante.

[fols. 70-73] And at another day, to-wit: At a Circuit Court held for the County of Ohio, at the Court House of said County, on the 5th day of March, 1934, among others the following proceedings were had:

Judgment omitted. Printed side page 17, ante.

[fol. 74] In Circuit Court of Ohio County, West Virginia

In the Matter of the Appeal of the Wheeling Steel Corporation from the Assessment of Certain of its Intangible Property for the year 1933

Memorandum of Opinion

The opinion of this court in the matter of the petition of Fidelity Investment Association is handed down simultaneously with this one. The part of that opinion deal-

ing with the first two points there considered—the constitutionality of chapter 40 of the acts of 1933, regular session, and with its retroactive nature—is incorporated herein by reference.

Agreed Facts

Wheeling Steel Corporation is and has been since June 21, 1930, a Delaware corporation. Its principal office is in Wilmington, Delaware. The law of Delaware requires that its certificates of incorporation state the name of the county and city in which its principal office is to be located, and its certificate complies therewith. It was and is qualified to do business as a foreign corporation in West Virginia, Ohio and Minnesota. Its stock ledger and records are kept in New York City with duplicates in its principal office. Its general business offices are located in Wheeling, [fol. 75] West Virginia, and its stockholders' and directors' meetings are there held in conformity with Delaware law. Its general books and accounting records are there kept.

Petitioner maintains sales offices in Atlanta, Buffalo, Cincinnati, Detroit, New Orleans, Philadelphia, San Francisco, Boston, Chicago, Dallas, Los Angeles, California, St. Louis, Seattle, and New York. It has manufacturing plants and coal properties in both West Virginia and Ohio. It has iron ore properties in Minnesota and controls, through stock ownership, coal properties in Pennsylvania and Kentucky. The total valuation of its West Virginia property amounts to a little more than one-fourth of the value of all its property and the products of its West Virginia plants amount to a little less than one-fourth (in value) of all its products. In addition to these the corporation owns four steamboats, two motorships, eighty-five coal barges, six freight barges, registered at the Port of Pittsburgh and operating on the Allegheny, Ohio and Mississippi rivers, transporting coal and steel. It will thus be seen that the company has offices of one kind or another in fifteen states and owns property in four, aside from its subsidiary control and without regard to the services of its river fleet. No statement is found as to the number of states and countries with whose residents it transacts business and this is probably unimportant.

Employment office are maintained at each plant, payroll checks are issued at each plant and the payrolls are there made up and there distributed. They are likewise paid with funds on deposit in banks in localities where the plants are situated.

Sales contracts are negotiated and orders taken at all the offices above referred to. These contracts and orders are subject to acceptance or rejection at Wheeling. The plant at Portsmouth, Ohio, prepares complete invoices and mails them for all products shipped from that plant, together with bills of lading and shipping notices. All [fol. 76] other plants follow the same course except that the invoices are not completed with regard to the price of material described therein. These incomplete invoices are forwarded to Wheeling where they are completed and mailed to the customer. All invoices are payable in Wheeling. Most of the commercial accounts are paid by check issued in Wheeling. Dividends are paid from New York City from funds on deposit there, although, as indicated above, and of necessity, ordered and declared at the meetings held in Wheeling. The capital stock is transferable in both New York and Wheeling but registerable only in New York.

The company owns a large office building in Wheeling and occupies about forty-three per cent of it with its own officers and employees.

Petitioner filed its tax returns for the assessment year beginning January 1, 1933. This tax return showed cash in banks and on hand, $2,703,974.38. The cash shown in West Virginia banks was $849,161.99. The rest of the cash was distributed among Ohio, Pennsylvania, New York and Illinois. Petitioner returned for taxation as money on hand and on deposit $312,729. It arrived at this amount by taking the sum of West Virginia payrolls plus West Virginia purchases and dividing it by total payrolls plus total purchases and multiplying the quotient by total cash. In figures that formula appears as follows:

$$\frac{1,417,273.53—831,831.03}{8,738,237.77—7,864,102.40} \text{ X } 2,307,773.61—312,703.32$$

The amount of cash on hand on January 1 was not the same as that on hand December 31. There are, further,

certain specifications of deductions allowed and disallowed but they need not be considered at this time for reasons which are apparent later.

On other intangible the company reported the following:

[fol. 77] Accounts and notes receivable, less reserve	$2,377,848.00
Advance payments on ore contracts	155,311.00
Balance due from employes under stock purchase plan	59,676.00

After certain deductions of sums belonging to subsidiary companies, this amount was reduced to $2,446,500.00. (This was by the assessor, and again the disagreement on figures becomes immaterial). The agreement is that the property total of accounts and notes receivable on January 1, 1933, was $2,234,743.00.

Of this amount petitioner claims that it should be taxed, it at all, on only $72,310—the amount of money due from residents of West Virginia. Of this amount only $26,296.96 is due from residents of West Virginia for goods manufactured in West Virginia. It should further be mentioned that of the balance due from employees under stock purchase plan only $25,238.66 was owed by residents of West Virginia. This seems to cover the important part of the agreed statement, but other matters may be suggested in the course of the opinion.

Facts from Petition

Section XII, paragraph a of the petition, contains a statement that except for the amount of $72,310 the accounts receivable are due from debtors of petitioner resident in states other than West Virginia and representing sales by petitioner to such debtors of goods manufactured outside the state of West Virginia and shipped from such outside points to said non-resident purchasers. This statement is not in the agreed facts, but it is not controverted and, as it seems important, the court will consider it as true. In this connection it is further assumed without statement but as manifestly the only reasonable course that all goods manufactured by other plants wherever sold are shipped direct from those plants to the purchasers. In other words, the Wheeling branch does not operate as a

[fol. 78] store except insofar as its own manufactured goods are concerned.

Facts Added by Agreement of Counsel

As the practical application of the statute involved seems important, in view of the fact that the court is of opinion that except for the debts deductible section the statute is unchanged for our present purpose, the prosecutor, the assessor and one of counsel for petitioner were called into conference. It is agreed that throughout the past Wheeling Steel Corporation has consistently listed all of its money and all of its credits but without affirming or denying that they are subject to tax as its deductible indebtedness was always in excess of these items. It is understood that no attempt has hitherto been made to assess taxes on money or credits, although it is equally understood that the problem has never been presented—certainly not as far as petitioner is concerned.

The Statutes

The code of 1931, 11-3-12, provided, with omissions, the following:

"Each incorporated company having its principal office or chief place of business in this state, or owning property subject to taxation in this state, * * * shall annually, between the first day of the assessment year and the first day of May, make a written report * * * to the assessor of the county in which its principal office or chief place of business is situated, showing * * * (c) the amount of money on hand or on deposit anywhere subject to its check or draft, on the first day of the assessment year; (d) the amount of credits and investments other than its own capital stock held by it on said date, with their true and actual value; (e) * * * its real estate, and the magisterial district or districts in which it is located; (f) * * * its tangible property in each magisterial district in which it is located."

[fol. 79] Then followed the provision for report of deductible debts. The following section provides that the assessor "shall assess the value of all the property of such corporation liable to taxation."

It then provides that property from item (e) shall be entered in the land books and (c) and (d) in the personal property books in the magisterial district wherein is the principal office or chief place of business of the corporation, while item (f), the tangibles, shall be entered in their respective magisterial districts. It is then stated as follows:

"The property mentioned in items (c), (d), (e) and (f) shall constitute all the property on which any such corporation shall be liable to pay taxes."

(Note that it does not say that all such property shall be taxed.)

It then provides,

"If a company have branches, each branch shall be assessed separately in the county and magisterial district where its principal office for transacting its financial concerns are located"—if no such office then in the district where its operations are carried on.

As far as the parts with which we are now dealing are concerned, these sections had not been revised for over twenty-five years. In 1933 the legislature, while allowing section 13 to remain as stated, amended article 12 so as to begin "each incorporated company, foreign or domestic, having its principal office or chief place of business in this state, or owning property subject to taxation in this state." It further struck out the provision as to reporting deductible debts. Items (c), (d), (e), (f), together with the requirements for reporting them, remain unchanged.

[fol. 80] The new act likewise provides in 11-3-15 for the assessment of capital used in trade or business by natural persons. This section provides that the value of that capital shall be ascertained by requiring the owner, agent or chief accountant to report the following:

(c) The amount of all money derived from or belonging to such trade or business, on hand or remaining uninvested on that day, whether in or out of the state, payable to such i-dividual or firm;

(d) The amount in value of all credits arising out of any such business and remaining unpaid on that date, whether due or not, and whether in or out of the state;

(e) The amount and true and actual value of all money, notes, bonds, bills, accounts receivable, stocks and other intangible property made by such person or firm whether in or out of the state, other than those hereinbefore specified."

As the word "such" is used in two of these sections and as the word "such" evidently refers to "such trade or business carried on in any county of the state" petitioner claims there is discrimination.

In addition to these statutes, petitioner relies further on 11-5-1—the section defining what personal property is taxable. It is contended that that section limits the taxation of personal property to that belonging to residents, that in the state owned by -on-residents and that belonging to citizens and loaned outside the state.

There remains only to add that 11-5-6 providing for deduction of indebtedness has been repealed.

It has been mentioned that petitioner returned a certain amount of bank deposits computed according to a formula already expressed and the amount of accounts receivable due from residents of West Virginia. Petitioner does not admit that it is subject to taxation on these amounts, but submits them as the only possible subjects of taxation. [fol. 81] The attorney general takes the stand that all money and credits of the company are taxable in West Virginia. The prosecuting attorney states that he knows of no authority to tax bank deposits outside the state, or to tax debts due from non-residents to a non-resident; his contention is that petitioner is taxable on all its bank deposits in the state, and on all debts due from residents thereof.

It will be simpler to discuss first the general application of the statutes, and then their particular application. In the first place, the court holds—apparently without dispute by counsel—that we are now concerned with no change in the statute other than the provision eliminating the deduction of debts. The insertion of the words "foreign or domestic" makes no change. The statute has been con-

sistently regarded as applying to both foreign and domestic corporations and it is quite obvious that, as it has always included all corporations owning property subject to taxation in West Virginia, the point does not seem to require further discussion. The important feature lies in the determination of what it attempts to tax. For this reason, in the mention of the statutes above, the words "all the property of such corporation liable to taxation" were underlined when used in reference to the assessor's duties. Those words seem to indicate that the legislative intent was to tax everything it could tax, but not to attempt to tax what it could not. This may serve the statute from the ridiculous implication apparent in Section 12, that if a corporation owns any property subject to taxation in West Virginia, it thereupon becomes liable to pay a tax to that state on all its intangibles wherever situate and however derived. The attorney general does not contend that this latter is the law—he contends it is the law in regard to Wheeling Steel Corporation, but bases his argument on the conditions attending petitioner.

The attitude of the Supreme Court of the United States on double taxation of personal property is here of extreme importance. As indicated in the opinion in the matter of [fol. 82] the Fidelity Investment Association, this court is convinced by the cases of Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 205, 75 L. Ed. 190, 50 S. C. R. [illegible], 65 A. L. R. 1000, and Baldwin v. Missouri, 281 U. S. 586, 74 L. Ed. 1056, 50 S. C. R. 436, 72 A. L. R. 1303, that the doctrine of that court now is that personal property, tangible or intangible, has a situs and may be taxed only in the state of that situs. That this proposition is arguable needs reference only to the fact that Justices Holmes, Stone and Brandeis have uniformly expressed dissent, although Justice Stone concurred in the former decision—not in the principles laid down. The second and third paragraphs of Justice McReynolds' opinion on page 1004 of 65 A. L. R. settled this. The result of this holding is that a state may not tax intangibles unless their situs is within that state. In other words, this does away with the old idea that the maxim mobilie sequuntur personem can be altered by statute. A state cannot by statute fix the situs of personal property—that personal property has an actual situs, either under the maxim stated or, as a matter of business, outside

that state. These cases arose by reason of inheritance taxes, but Justice McReynolds specifically refers to ad valorem taxation on page 1306, third paragraph, 72 A. L. R. Ad valorem taxation is a term sufficiently broad to apply to all our present points of discussion.

On theory this doctrine is arguable, as mentioned. As a matter of practice it is almost a necessity. The doctrine of business situs, modifying mobile sequuntur personam, grew up because it seemed manifestly unfair that states having definite charge of a business and protecting it should derive no benefit therefrom or should be denied the revenue from property actually situate therein, although owned by a non-resident. Unfortunately, the doctrine of business situs is subject to abuse, and, as its rules are rather arbitrary, it could work far more hardship than the original maxim. If each state were entitled to declare by statute what is a business situs, and no court could review those [fol. 83] decisions, it is obvious that petitioner in this case might be taxed in so many states as to deny it the right to operate.

We, therefore, modify the first paragraph of the syllabus in Baldwin v. Missouri and hold that the imposition of a tax by a state in respect to deposits in banks within the state to the credit of a non-resident and debts owed by citizens of the state (or otherwhere) to a non-resident when such deposits or debts have not been given a business situs in such state, violates the due process clause of the 14th Amendment.

In this respect, this court is bound by the decision of the Federal Supreme Court just as much as it is by a decision of the Supreme Court of Appeals of West Virginia.

We must not overlook the fact that double taxation is not hereby averted. Every taxation of credit is double taxation. The one hundred dollars in the hands of A is taxable. When he lends it to B it is taxable in the hands of B and the obligation will be taxable in the hands of A. This interchange can be carried on indefinitely so that the same property may be taxed without restriction on the number of times. In addition to that, a taxation of credit without debts deductible is a penalty on the extension of credit. The cash and carry business is exempt from this tax. The man who owes and is owed nothing is exempt from this tax. The man who owes and is owed five million dollars

is taxed on five million dollars, although he does not owe more than the man who owes and is owed nothing. It is, therefore, not strange that our Supreme Court is endeavoring to shield the owners of intangibles from taxation thereon in more than one state.

From this it will be seen that the matter of discrimination, mentioned above as contended by petitioner, has no practical application. If the state has attempted to tax either an individual or a corporation on property having a situs outside the state, that attempt is void.

It may here be mentioned that attention is called to the fact that Ohio taxes some of these credits of this petitioner [fol. 84] in the amount of $250,133.42. This fact is not helpful. Ohio may or may not have a right to tax them, and it is on this rather than on actual taxation that any importance must rest. This is clearly shown by the remarks of Justice McReynolds on page 1003, 65 A. L. R., in regard to Coe v. Errol, 116 U. S. 517, 524, 29 L. Ed. 715, 6 S. W. 475. The Coe case was long the authority in support of double taxation. Justice McReynolds points out that the fact that logs were taxed in Maine would not prevent their being taxed by New Hampshire. This was not because both states could tax them, but because the imposition of an erroneous tax in Maine did not oust New Hampshire of tax jurisdiction.

Accordingly, we are left with our old West Virginia statute, with no express language to guide us and not even a decision of our Supreme Court to shed light. The only West Virginia authorities cited are the dicta in Watson v. Fairmont, 38 W. Va. 183, 13 S. E. 467, and Wheeling v. Hawley, 18 W. Va. 476. These decisions merely hold that money, credits, and securities follow the person and that that is the settled law of West Virginia. In other words, West Virginia has never officially recognized business situs as a part of its law. However, while there is a Michigan case to the contrary, the mere fact that a state has never recognized this doctrine is not ground for rejecting a doctrine so universally recognized. Re Dodge Bros., 241 Mich. 665, 217 N. W. 777.

A more serious matter arises in regard to the construction of the statute itself. As indicated, the legislature has said, in effect, "We are going to tax everything that an individual or a corporation owns and which we may lawfully

tax, and therefore the assessor shall take the reports required and determine what is liable to taxation. If an assessor cannot determine this, the courts may do so". Let us add to this the fact that the reports as required by statute will in no manner enable the assessor so to decide. The petitioner has made its report more elaborate than necessary, so the question does not here arise on the facts; [fol. 85] but it will readily be seen that a court must be charitable in order to give to this statute the effect for which the state contends.

However, the situation is not without precedent. In Coal Co. v. Fox, an Indiana case reported in 176 N. E. 11 and 79 A. L. R. 333, we find on pages 338 and 339 of the last-mentioned report a statute which is, for all practical purposes, on all fours with this in the matter of credits. The court did not allow the tax involved in that case, but it did not disallow it by reason of the statute. The validity of a statute is to be presumed. The court has entertained considerable doubt as to the question of the validity of this particular statute—merely because it has very little patience with a legislative enactment which leaves the actual taxing part of the statute to be written in by assessors and courts. It is exactly the same as if the legislative should say "We tax all the property mentioned in the constitution. The assessor will carry out this provision."

As charity seems to be generally extended to these attitudes, the statute is held valid, although with considerable misgiving. The admirable statute of Louisiana, found in New Orleans v. Stemple, 44 L. Ed. 474, and in some of the other Supreme Court decisions cited by counsel and involving the Louisiana statute, shows how simple it is for a legislature to say what it means. In this case, the court is obliged to fill in a blank.

We, therefore, hold that the statute does tax all property situated in the state of West Virginia. What tangibles are within the state of West Virginia? Many attempts have been made to answer this question, but they are generally limited to specific cases. The attorney general makes the broad claim that Crane Co. v. Des Moines, 208 Iowa 164, 225 N. W. 344, 76 A. L. R. 801, holds that all accounts payable in a certain place are taxable. Petitioner's counsel represents that this case holds that the accounts in question were not taxable. Both statements are correct unless we apply the technical meaning to the word

[fol. 86] hold. The case held the particular accounts involved are not taxable; but it did say by way of dictum that accounts due the Crane Co. for goods sold through its Des Moines office, also some accounts represented goods sold directly from the Chicago office and charged against the Des Moines agency, for which the Des Moines agency was expected to collect, were taxable in Iowa. It then proceeded to hold that the statute involved did not tax them. If the facts given in this case are all the facts, it must be held that the holding cited by the attorney general is both dictum and bad law. We are told that the Des Moines agency was to collect all of these accounts and remit the same promptly to the home office at Chicago, and remittances were made every week covering collections so made. It does not even say that these accounts were owed by Iowa debtors. Surely it is unnecessary to point out that if an individual sends an account or accounts for collection from his home state to another state, those accounts do not thereby become taxable, even though the collector may be engaged in business in the second state on behalf of the owner of the accounts. The simple case is that where a corporation or individual (for the same rules apply to both) resides, say in New York and has different stores throughout the country. At each store sales are made and credits extended. Each store is, for all practical purposes, a business unto itself. The accounts of that store are undoubtedly taxable in the state of its situs, as long as that store carries on business in that way. This is well illustrated in Armor Packing Company v. City Council, 45 S. E. 424 (Ga.). The syllabus is so apt ~~it may be~~ quoted:

"Notes, accounts, and other choses in action in the hands of an agent of a non-resident corporation of this state, and which were received in the course of the business so conducted, are taxable by such municipal corporation."

It will be noted that this makes no distinction as to the domicile of the debtors. But when we turn to bank deposits, we find that the bank deposits of that business are [fol. 87] similarly taxable unless it is the custom of the agent to forward them with reasonable promptness to the head office. Commonwealth v. R. G. Dun & Co. (Ky.), 102 S. W. 859. Commonwealth v. Prudential, 149 Ky. 380, 149 S. W. 836.

This distinction shows clearly a point of which we must never lose sight. The maxim that personalty follows the person is still the law as regards intangibles. In this case all of petitioner's intangibles are taxable in Delaware unless they have acquired a business situs elsewhere, as we have seen. It is not a case of escaping taxation. Petitioner may be taxed in full in Delaware unless some of its intangibles have acquired an actual business situs otherwhere. There is loose language in some of the cases to the effect that an individual taxed carries the burden of proving that his property is not taxable. This can mean only that the burden is on him to show that he is a non-resident and that the property is intangible. Once these are shown, the presumption is that the property is taxable at his domicile. Consequently, when a company is engaged in far-flung operations, it not infrequently happens that each transaction is so linked up with several states that the credit arising therefrom acquires a business situs nowhere, and its only situs is the original domiciliary situs. In reasoning along this line, we must further always remember that a credit does not always depend on the circumstances giving rise to it, although in business these circumstances usually threw a great deal of light. It need hardly be mentioned that the situs of a credit may be changed from time to time after the credit has come into being.

The word "far-flung" is taken from the case of American Barge Line v. Board, 55 S. W. (2d) 416. In that case, a Delaware corporation had barges on the Mississippi and Ohio rivers from Pittsburgh to New Orleans, had scattered offices, but cleared or accounted for all its business through the Louisville office and all its bills were payable there. Business was done in many states and it was held that the [fol. 88] business situs rule is inapplicable to accounts receivable arising from far-flung business. That is unquestionably the law. If credits are interstate rather than intrastate (this refers to interstate situs and not to interstate commerce) their situs is at the domicile of the owner. It follows that petitioner is taxable only on accounts arising from its business in West Virginia, but it is taxable on all those accounts. The business in West Virginia includes transactions where the sales are made in West Virginia, the shipments are made from West Virginia and the accounts are payable in West Virginia. These accounts would

seem to have a fixed and definite situs in West Virginia, without regard to the domicile of the debtors. This is well brought out in Hardware Co. vs. Multnomah County, 115 Pac. 150 (Ore.). In that case, a Minnesota corporation operated a branch in Portland. The Portland branch received payment for sales made in Oregon and other states and collected all the accounts incurred with it, retaining a small sum and remitting the excess to the main office. The cash and accounts in the possession of the branch office were held taxable in Oregon, without regard to the residence of the debtors, but no tax was assessed on moneys remitted from this business to the main office. Facts are set forth in this case to indicate that taxation was further allowed on bills payable at the Oregon office, arising by reason of goods shipped from Duluth. If the court intended to carry the doctrine that far, this court must dissent.

There is no reason why this should not apply to bank deposits as well, except that the courts consistently refuse to apply it. Consequently, the holding is that petitioner must pay taxes on all of those local bank deposits arising out of the Wheeling business, the same rule as to what is Wheeling business to be applied in this as is indicated above for credits.

It follows that the court cannot write figures into its opinion. Those figures are not forthcoming and, tech-
[fol. 89] nically, the state has not asked that they be forthcoming. Once again the court must write language into the statute and order the petitioner to make such reports.

It is realized that, in a matter of so much confusion, it may be that the court has not expressed itself clearly. For this reason, the holding may be summed up as in the following paragraph:

Credits arising from sales made in West Virginia of goods shipped from West Virginia plants with accounts therefor payable in Wheeling are properly taxable. As to the bank deposits, only so much thereof may be taxed as is in West Virginia banks by reason of moneys received by reason of sales made as indicated—in West Virginia, with shipments from West Virginia and payable in Wheeling.

It is realized that it may be very difficult to provide the figures on the bank deposits. The court has no quarrel with the method adopted by petitioner, as far as fairness is concerned, but cannot adopt it as a matter of law. How-

ever, if the petitioner is unable to furnish this information, it will then be time enough to consider this point.

On the matter of credits, as indicated on page four of this opinion, the court is considering it true that, with the exception of $72,310, the accounts receivable are due from debtors of petitioner resident in states other than West Virginia and representing sales by petitioner to such debtors of goods shipped from outside points. While the court accepts this as true for its opinion, counsel are, of course, permitted to correct it if untrue. Applying what is said above to this statement, presumably credits are taxable only in the amount of $26,296.96, although the statement is incomplete in that respect—it states that the goods on which the other credits from West Virginia debtors were based were manufactured outside the state of West Virginia, but does not say that they were shipped from outside points. Apparently, from the general nature of petitioner's business, this latter is a necessary implication.

It has been suggested that an order on this petition is [fol. 90] necessary before January 1. If so, it must be entered immediately upon receipt of this opinion—on Friday, December 29. This necessity for prompt action arises from the fact that these cases were submitted by counsel so late that it has been impossible to give them proper consideration and have these opinions ready before the late afternoon of Thursday, December 28.

As the principles enunciated in this opinion seem to cover the petitions of Bloch Brothers Tobacco Company and Mail Pouch Tobacco Company, no separate opinions thereon are handed down. However, the facts in those cases are not identical and if a dispute arises, counsel may confer with the court before entry of orders therein.

Addendum

The above opinion omits to dispose of credits due from employees on the stock subscriptions. This is not in any sense a localized business and none of it should be taxed in West Virginia. It is purely a matter for the domicile of the corporation.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 91] IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 7970

In re WHEELING STEEL CORPORATION ASSESSMENT

Ohio County

OPINION

Reversed and Remanded

1. The rule of mobilia secuunter personam "merely means that the situs of personal property for purposes of taxation is the domicile of the owner unless there is a statute to the contrary, or * * * in case of intangible property, it has acquired a business situs in a state other than the one where the owner is domiciled." Cooley, Taxation (4th Ed.), section 440.

2. Under Code 1931, 11-3-12 and 13, as amended by the legislature, Acts First Extraordinary Session 1933, chapter 38, the intangible property of a foreign corporation with its chief place of business in this state, not shown to be primarily liable for taxation in some other jurisdiction, may be assessed for taxation in this state.

[fol. 92] HATCHER, Judge:

This proceeding involves the taxation of the intangible property of Wheeling Steel Corporation (hereinafter called the corporation), a foreign corporation which has its chief place of business in this State. The assessor of Ohio County made a total assessment against the corporation for intangibles of $4,963,950. That assessment was reduced by the Tax Commissioner to $4,491,323.67. The circuit court further reduced it to $496,095.35. The State and the county taxation units secured an appeal here.

The facts are agreed. The corporation was chartered in Delaware and is now qualified to do business in Ohio and Minnesota as well as West Virginia. The principal offices of the corporation are stated in its charter to be located in the city of Wilmington, Delaware, but the corporation performs no actual business in Wilmington, and maintains there only such nominal office as the laws of Delaware require. The corporation's general business offices are

located in Wheeling where it owns a twelve story office building. Approximately 43% of the building is occupied by the corporation for its office work. Its managing officers reside at Wheeling. It maintains sales offices in fourteen of the larger cities throughout the United States. On January 1, 1933, it owned coal properties in West Virginia and Ohio, and, through stock ownership, controlled coal properties in Pennsylvania and Kentucky. It owned iron ore properties in Minnesota. It owned four manufacturing plants in West Virginia and four in Ohio. It owned four steamboats, two motor ships, and ninety-three barges used in transporting coal and steel on the Allegheny, Ohio and Mississippi rivers. The agreed statement of facts shows the transaction of the following business at [fol. 93] Wheeling.

"The petitioner's (the corporation's) general books and accounting records are kept at the Wheeling office. * * *

Sales contracts are negotiated and orders are taken by the various sales offices subject to acceptance or rejection at Wheeling.

The Portsmouth, Ohio, plant makes up and mails out invoices for all products shipped from that plant, together with bills of lading and shipping notices. All other plants prepare complete invoices with exception of information with reference to the price of material described therein. The latter invoices are then forwarded to Wheeling where they are completed and mailed to the customer. Bills of lading and shipping notices are, however, mailed to customers from the individual plants. All invoices are payable in Wheeling.

The majority of commercial accounts are paid by check issued in Wheeling. Payrolls are made up and payroll checks are prepared and signed at the various plants and are distributed to the employees by the respective plants. Such checks are paid with funds on deposit in banks in localities where the plants are situated. * * *

The capital stock is transferable in both New York City and Wheeling, but is registerable only at the office of the Registrar in New York City. Capital stock records are maintained in New York City and at the Wheeling Steel Corporation's Delaware office.

Dividends, when declared, are ordered to be paid and distributed at meetings held at Wheeling, although the

checks are drawn and distributed by the Dividend Disbursing Agent located in New York City, and are paid with funds on deposit in banks in New York City."

The total assessed value of the real estate and tangible personal property owned by the corporation on January 1, 1933, was $31,977,600. The assessed value of its real estate and tangible personal property in West Virginia on January 1, 1933, was $8,673,205, or 27.10% of the total. The total shipments from plants located outside of West Virginia in 1932 amounted to $13,787,742.25. The total shipments from West Virginia plants in 1932 amounted to $4,402,872.01, or 24.20% of the total shipments. The corporation had bank deposits in five states on January 1, 1933, amounting to $2,307,773.61, of which there was [fol. 94] $849,161.91 cash in West Virginia banks. Of the West Virginia bank deposits $121,684.91 was derived from the sale of goods manufactured in this state. The total amount of accounts and notes receivable on January 1, 1933, was estimated at the probable worth of $2,234,743.11. Of that sum $374,410.42 was due on account of goods manufactured in this state. The corporation pays to the state of Delaware only such taxes as are requisite to protect its corporate franchise. It was assessed in Ohio in 1933, under the statutes of that state, $250,133.42 on its intangible property. That assessment was not included in the deductions allowed by the Tax Commissioner.

The assessment fixed by the circuit court consisted of the above items of $374,410.42 for credits, and $121,684.91 for bank deposits.

The corporation charges cross-error. Its primary contention is that under the rule of mobilia secuunter personam its intangible property cannot be taxed anywhere except in the state of Delaware. That rule is merely a convenient "fiction" and cannot be allowed "to obscure the truth." Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395. The modern conception of the rule is well expressed by a leading authority on taxation as follows: "So far as applied to taxation it merely means that the situs of personal property for purposes of taxation is the domicile of the owner unless there is a statute to the contrary, or * * * in case of intangible property, it has acquired a business situs in a state other than the one where the owner

is domiciled." Cooley, Taxation (4th Ed.), sec. 440. Accord: Safe Deposit & T. Co. v. Virginia, 280 U. S. 83, and the wealth of authority cited in Annotation 76 A. L. R. 806. The attorney general contends that this assessment is within both the exceptions mentioned by Cooley.

[fol. 95] Code 1931, 11-3-12 and 13, as amended by the legislature, Acts First Extraordinary Session 1933, chapter 38, provides as follows: "Each incorporated company foreign or domestic having its * * * chief place of business in this state * * * shall annually * * * make a written report to the assessor, showing the following items: * * * (c) the amount of money on hand or on deposit anywhere subject to its check or draft on the first assessment day of the year; (d) the amount of credits and investments other than its own capital stock held by it on said date with their true and actual value." Upon receiving such report the assessor "shall assess the value of all property of such corporation liable to taxation and enter the same as follows, viz: * * * all property in items (c) and (d) shall, together with their valuation, be entered in the personal property book of the county, and in the magisterial district wherein is the * * * chief place of business of such corporation." The statutes reflect clearly the legislative will to tax all intangible property of the corporation (items c and d) "liable to taxation."

It is well recognized in modern cases that intangible property may acquire a "business situs" for purposes of taxation in a state other than the state of the owner's domicile. Cooley, supra, section 465; New Orleans v. Stempel, 175 U. S. 309; Bristol v. Washington Co., 177 U. S. 133; Annotation 79 A. L. R. 344. The facts agreed herein show that the management of the corporation radiates from Wheeling and that the major part of its executive business is performed or initiated there. We are of opinion that such a localization of the corporation's business at Wheeling imparts to its entire intangible property a prima facie situs for taxation at that place. There is no inhibition in the Federal Constitution against the taxation of such property by the state. Board of Assessors v. Comptoir National, 191 U. S. 388. Wherefore, the learned trial court should not [fol. 96] have limited the assessment to credits and cash arising merely from sales of the corporation's West Vir-

ginia products. On the other hand, the Federal Court cautions against an assessment "intrinsically arbitrary" of a unitary corporation enterprise which is conducted in several states, and warns that an apportionment of its intangible property among such states for purposes of taxation may be requisite. See Hans Rees' Sons, Inc. v. North Carolina, 283 U. S. 123. The statutory limitation of the assessment to property "liable to taxation" indicates that the legislature had this contingency in mind and did not propose to tax intangibles which were primarily subject to taxation in another jurisdiction. The agreed statement of facts shows that Ohio has, by virtue of its statutes, claimed the right to tax intangible property of the corporation to the extent of $250,133.42. For the purposes of this opinion, we assume that the claim of our sister state is well founded, and should be deducted from the assessment as corrected by the Tax Commissioner. The agreed statement does not disclose a like claim by any other competent jurisdiction. But since this proceeding was tried under wrong conceptions of the law by the several parties hereto, it may be that all the pertinent facts were not developed. Therefore we are of opinion to remand this proceeding to the circuit court in order that it may be determined whether or not further deductions should be made in deference to the legal demands of other states.

The judgment of the circuit court is accordingly reversed, and the case remanded.

Reversed and remanded.

A true copy. Attest.

Wm. B. Mathews, Clerk.

[fol. 97] In Supreme Court of Appeals of West Virginia

7970

In re Wheeling Steel Corporation Assessment

State of West Virginia et al., Plaintiffs in Error

Mandate—Nov. 27, 1934

Upon a writ of error to a judgment of the circuit court of Ohio County, rendered on the 5th day of March, 1934.

The Court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments

of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is error in said judgment. It is therefore considered by the Court that the judgment of the circuit court of Ohio County, rendered in this case on the 5th day of March, 1934, be and the same hereby is set aside, reversed and annulled, and that the plaintiffs in error do recover from the defendant in error the Wheeling Steel Corporation their costs about the prosecution of their writ of error in this Court in this behalf expended. And this case is remanded to the circuit court of Ohio County for further proceedings to be had therein according to the principles stated and directions given in the written opinion aforesaid, and further according to law: all of which is ordered to be certified to the circuit court of Ohio County.

The decision of points in the foregoing case, as the same appears from the syllabus and written opinion prepared by Judge Hatcher, was concurred in by Judges Woods, Litz, Maxwell and Kenna.

A true copy. Attest.

Wm. B. Mathews, Clerk Supreme Court of Appeals.

A copy teste. L. L. Nightengale, Clerk.

[fols. 98 & 99] Bill of costs omitted in printing.

[fol. 100] In Circuit Court of Ohio County

Tax Appeal

Wheeling Steel Corporation, a Corporation, Plaintiff,

vs.

Fred L. Fox, State Tax Commissioner of West Virginia, and Karl G. Sailer, Assessor of Ohio County, West Virginia, Defendants

In the Matter of the Appeal of Wheeling Steel Corporation, a Corporation, from the Assessment of Certain of Its Intangible Property for the Year 1933

Judgment—July 8, 1935

This matter came on this 8th day of July, 1935, again to be heard upon the petition of Wheeling Steel Corporation

and exhibits filed therewith and made a part thereof; upon the agreed statement of facts filed herein and made a part of the record in this cause; upon additional facts made a part of the record herein by agreement of the parties and included in an order entered by this court herein upon the 5th day of March, 1934; upon the opinion of the Supreme Court of Appeals of West Virginia handed down in this cause upon the 27th day of November, 1934, (In re. Wheeling Steel Corporation Assessment) and upon the mandate of said court, dated the 10th day of April, 1935, hereby made a part of the record in this cause, upon the additional stipulation dated July 8, 1935, filed herein and made a part hereof, and upon all other proceedings herein and upon argument of counsel for the parties.

Upon consideration of all of which, and particularly the additional stipulation of facts filed herein, and in conformity with the opinion and mandate of the Supreme Court of Appeals of West Virginia, it is adjudged, ordered and decreed that the assessment made by the County Assessor, as corrected by the State Tax Commissioner, of Wheeling [fol. 101] Steel Corporation's cash in banks and on hand on January 1, 1933, in the amount of Two Million Three Hundred Seven Thousand Seven Hundred Seventy-three Dollars and Sixty-one Cents ($2,307,773.61), and of accounts and notes receivable owned by Wheeling Steel Corporation on January 1, 1933, in the amount of Two Million Forty-six Thousand Four Hundred Four Dollars and Twenty-four Cents ($2,046,404.24), be and it is hereby further amended in accordance with said opinion of the Supreme Court of Appeals of West Virginia by deducting from the total thereof the sum of Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42), being the amount of moneys, accounts and notes receivable of Wheeling Steel Corporation assessed to it in the State of Ohio, leaving a remainder of Four Million, One Hundred Four Thousand, Forty-four Dollars and Forty-three Cents ($4,104,044.43), upon which said Wheeling Steel Corporation shall be assessed for property taxation upon its moneys, bonds, credits and investments in the said amount of Four Million One Hundred Four Thousand, Forty-four Dollars and Forty-three Cents ($4,104,044.43) for the calendar year 1933.

It is, therefore, further ordered, adjudged and decreed that the said Wheeling Steel Corporation shall be assessed for the year 1933 on account of moneys, bonds, credits and investments in the said amount of Four Million One Hundred Four Thousand Forty-four Dollars and Forty-three Cents ($4,104,044.43).

It is further adjudged, ordered and decreed that, in conformity with the additional stipulation herewith filed, this case shall hereafter be styled Wheeling Steel Corporation, a corporation, vs Fred L. Fox, State Tax Commissioner of West Virginia, and Karl G. Sailer, Assessor of Ohio County, West Virginia.

It is further adjudged, ordered and decreed that the said Wheeling Steel Corporation is not entitled to any further deductions on any account except the amount of intangibles assessed by the State of Ohio as aforesaid.

[fol. 102] It is further adjudged, ordered and decreed that a copy of this order be certified by the Clerk of this Court within twenty days from the entry thereof to the Auditor and State Tax Commissioner of West Virginia and the Sheriff and Assessor of Ohio County.

And the said Wheeling Steel Corporation objects and excepts to the entry of this decree assessing it upon an amount of its accounts receivable and bank deposits for the said year 1933. Upon motion of counsel for Wheeling Steel Corporation the execution of this decree is suspended for ninety (90) days from the date hereof for the purpose of giving said Wheeling Steel Corporation time within which to apply for an appeal or writ of error to the Supreme Court of Appeals of West Virginia, provided said Wheeling Steel Corporation shall forthwith give a stay bond, conditioned according to law, in the sum of Six Hundred Dollars ($600.00) for the purpose of establishing this stay.

Approved for entry.

Donald McKee, Prosecuting Attorney of Ohio County. Homer A. Holt, Attorney General of West Virginia, for Fred L. Fox, State Tax Commissioner of West Virginia, and Karl G. Sailer, Assessor of Ohio County, West Virginia.

Have seen: Wright Hugus, J. E. Bruce, for Wheeling Steel Corporation.

A copy. Teste. L. L. Nightengale, Clerk. (Seal Circuit Court, Ohio County, West Virginia.)

[fol. 103] IN CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

In the Matter of the Appeal of WHEELING STEEL CORPORATION, a Corporation, from the Assessment of Certain of Its Intangible Property for the Year 1933

ADDITIONAL STIPULATION—Filed July 8, 1935

Pursuant to the opinion of the Supreme Court of Appeals of West Virginia handed down herein on the 27th day of November, 1934, and for the purpose of supplying additional evidence required by said opinion, it is hereby stipulated and agreed by and between Wheeling Steel Corporation, Fred L. Fox, State Tax Commissioner, Karl G. Sailer, Assessor of Ohio County, and the State of West Virginia for itself and the taxing units of Ohio County, West Virginia, that the original statement of facts filed herein may be and is amended to include the following agreed facts and that the same may be taken and considered by the Circuit Court of Ohio County in this proceeding in the determination of the matters herein involved, the same as if said facts were testified to by witnesses:

1. That the taxpayer was assessed by the State of Ohio on account of intangibles in the amount only of Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42).

2. That when the review by the Tax Commissioner of the assessment of taxpayer's intangibles, as made by the Assessor of Ohio County, was made, neither the Assessor nor the State Tax Commissioner was advised that Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42) of such intangibles had been assessed and the tax thereon paid in the State of Ohio.

[fol. 104] 3. That no states other than Ohio and West Virginia have assessed taxpayer upon any of its intangibles for the year 1933.

4. That the money on deposit in banks outside the State of West Virginia on the first day of January, 1933, had been deposited in such banks by taxpayer by sending from taxpayer's Wheeling, West Virginia, office to such banks the

original checks or drafts received by taxpayer from its customers in payment for the purchase of materials, manufactured and sold by taxpayer, such checks having not first been deposited in West Virginia banks.

5. That taxpayer's deposits of money in banks outside and inside the State of West Virginia are not segregated by any policy or practice to keep separate the receipts from sales of products manufactured in and shipped from taxpayer's West Virginia plants and sales of products manufactured in and shipped from taxpayer's plants located outside the State of West Virginia. Ordinarily not more than 20% of the total moneys of taxpayer on deposit at any time in banks within and without the State of West Virginia has been derived from sales of taxpayer's products manufactured in and shipped from its West Virginia plants. This statement is made as of January 1, 1933.

6. In the year 1933, taxpayer spent in West Virginia for permanent plants and improvements and property additions the sum of Two Hundred Four Thousand Thirty-four Dollars and Fourteen Cents ($204,034.14), in the State of Ohio the sum of Nine Hundred Eighty-seven Thousand Three Hundred Sixty-three Dollars and Nine Cents ($987,363.09) and in other states the sum of One Thousand Five Hundred Ninety-four Dollars and Eighty-one Cents ($1,594.81).

7. That at least eighty per cent (80%) of the sum spent by taxpayer during the years 1932 and 1933 in the conduct of its business, including the purchase of materials, maintenance and repairs of plants, building of improvements and property additions, payrolls and other operating ex-
[fols. 105 & 106] penses were made in connection with the operations of its plants and business outside the State of West Virginia, and that all of such payments, excepting some sums of money borrowed by taxpayer from banks in New York City were made from the sale of its products, eighty per cent (80%) of which had been manufactured in the State of Ohio.

8. Of the moneys expended for payrolls, materials, new equipment, maintenance, operating expenses, and the conduct of the business in Ohio and states other than West Virginia, the moneys are expended by executive action

taken at Wheeling and by the drawing of checks or drafts at Wheeling, except in connection with the payment of payrolls at its Portsmouth, Ohio, and Steubenville, Ohio, plants where payroll checks or orders are drawn, but drawn against moneys sent to banks at such points for the express purpose of meeting the payrolls and for incidental items as they arise. All moneys are controlled and the expenditures directed by the Wheeling office, and if the immediate expenditure be made elsewhere, such immediate expenditure is made only under specific or general direction and control of the Wheeling office.

9. That hereafter this case may be styled: Wheeling Steel Corporation, a corporation, vs. Fred L. Fox, State Tax Commissioner of West Virginia, and Karl G. Sailer, Assessor of Ohio County, West Virginia, (In the matter of the Appeal of Wheeling Steel Corporation, a corporation, from the Assessment of certain of its Intangible Property for the year 1933).

July 8, 1935.

State of West Virginia, by Homer A. Holt, Attorney General. Donald McKee, Prosecuting Attorney of Ohio County. Fred L. Fox, State Tax Commissioner. Karl G. Sailer, Assessor of Ohio County. Wheeling Steel Corporation, by J. E. Bruce, Secretary.

[File endorsement omitted]

[fol. 107] [File endorsement omitted]

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed July 22, 1935

To their Honors, Judges of the Supreme Court of Appeals of West Virginia:

The Petitioner, Wheeling Steel Corporation, a corporation, respectfully represents that it is aggrieved by a final Judgment Order entered by the Circuit Court of Ohio

[fol. 108] County, West Virginia, on the 8th day of July, 1935.

Your petitioner respectfully shows:

That your petitioner is a Delaware corporation doing business in West Virginia and other states as a foreign corporation, having its general business offices in Wheeling, West Virginia.

That in its tax return for the year 1933 your petitioner reported for taxation cash in banks amounting to $312,729 and accounts and notes receivable totalling $72,310.

That on January 1, 1933, your petitioner owned cash on hand and in banks in the sum of $2,307,773.61, of which $849,161.99 was on deposit in West Virginia banks, the remainder being on deposit in banks in other states; that the sum of $53,072.63, included within said $849,161.99 on deposit in West Virginia, had been derived by your petitioner from sales of material manufactured in and shipped from your petitioner's plants located in West Virginia to customers resident in West Virginia; that the sum of $68,612.28, likewise included within said $849,161.99 on deposit in West Virginia, had been derived from sales of material manufactured in and shipped from your petitioner's plants located in West Virginia to customers resident in states other than West Virginia; that the sum of $727,477.08, likewise included within said $849,161.99 on deposit in West Virginia, had been derived from sales of material manufactured in and shipped from your petitioner's plants located outside of West Virginia to customers resident in states other than West Virginia; and that not more than twenty (20%) per centum of your petitioner's total money on deposit in banks located within and without the State of West Virginia was derived from sales of your petitioner's products manufactured in and shipped from its West Virginia plants.

That on January 1, 1933, accounts and notes receivable payable to your petitioner totalled $2,046,404.24; that receivables amounting to $374,410.42, included within said total, had been derived from sales of material manufactured in and shipped from your petitioner's plants located in [fol. 109] West Virginia; that receivables amounting to $302,100.42, included within said $374,410.42, had been derived from sales of material manufactured in and shipped from West Virginia plants to non-residents of West Vir-

ginia, and $72,310.00, likewise included within said $374,410.42, had been derived from sales of material manufactured in and shipped from West Virginia plants to residents of West Virginia; that the remainder of accounts and notes receivable, to-wit, the amount of $1,671,993.82, had been derived from sales of material manufactured by your petitioner outside of West Virginia and shipped from the places of manufacture direct to purchasers residing outside of West Virginia.

That the Assessor of Ohio County and the State Tax Commissioner of West Virginia assessed for taxation the total intangible personalty owned by your petitioner on January 1, 1933.

That your petitioner appealed from said assessment to the Circuit Court of Ohio County, and that the said Circuit Court entered a judgment order reducing the assessment to an amount equalling the accounts and notes receivable derived from sales of material manufactured by your petitioner in West Virginia and shipped from its West Virginia plants to customers wherever located, plus such portion of the money deposited in West Virginia banks allocable to West Virginia business upon the same basis.

That from this judgment of the Circuit Court of Ohio County the State Tax Commissioner and the Assessor of Ohio County appealed to the Supreme Court of Appeals of West Virginia, and that Your Honors, upon consideration of said appeal, rendered your opinion, now reported in 177 S. E. 535, reversed the judgment of the Circuit Court of Ohio County, and held that all the intangible property owned by your petitioner on January 1, 1933, had acquired a prima facie situs for taxation in West Virginia, but that, since the State of Ohio had taxed a portion of said intangible property, the amount thereof so taxed by the State of Ohio should be deducted from the total intangible property owned by your petitioner, that intangibles taxed by any other state should likewise be deducted, that the remainder thereof should be assessed for taxation in West Virginia, and remanded the proceeding to the Circuit Court of Ohio County in order that it might be determined what further deductions should be made.

That thereafter the Circuit Court of Ohio County found [fol. 110] that your petitioner is not entitled to any deductions other than the amount of intangibles taxed by the

State of Ohio as aforesaid, and in conformity with the opinion and mandate of Your Honors, ordered, adjudged and decreed that your petitioner be assessed for the year 1933 on account of moneys, bonds, credits and investments in the amount of $4,104,044.43, being the total value of the intangible property owned by your petitioner on January 1, 1933, less the amount taxed by the State of Ohio.

ASSIGNMENTS OF ERROR

From the adverse rulings assessing for taxation all of Wheeling Steel Corporation's intangible personal property owned by it on January 1, 1933, except that portion thereof assessed to Wheeling Steel Corporation in and by the State of Ohio, your petitioner respectfully seeks a writ or error. And as grounds therefor it respectfully submits that the Circuit Court of Ohio County erred in the following particulars:

1. The Circuit Court of Ohio County erred in refusing to hold invalid Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in their application to your petitioner, a Delaware corporation doing business in West Virginia and other States, since they tax property of your petitioner outside the jurisdiction of the State of West Virginia and thus deprive your petitioner of property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the United States Constitution.

2. The Circuit Court of Ohio County erred in sustaining the validity of Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in their application to your petitioner, a Delaware corporation doing business in [fol. 111] West Virginia and other States, and in construing said Sections to authorize the assessment for taxation in and by West Virginia of

(A) Any portion of your petitioner's intangible personal property;

(B) All of your petitioner's intangible personal property except that portion thereof which may have been taxed in and by States other than West Virginia;

(C) That portion of your petitioner's intangible personalty consisting of accounts and notes receivable derived

from shipments of products manufactured in and shipped from plants located in States other than West Virginia;

(D) That portion of your petitioner's intangible personal property consisting of accounts and notes receivable derived from shipments of products manufactured in and shipped from plants located in States other than West Virginia to customers located in States other than West Virginia;

(E) That portion of your petitioner's intangible personal property consisting of accounts and notes receivable derived from shipments of products manufactured in and shipped from plants located in West Virginia to customers located in States other than West Virginia;

(F) That portion of your petitioner's intangible personal property consisting of cash on deposit in banks located in States other than West Virginia;

(G) That portion of your petitioner's intangible personal property consisting of cash on deposit in banks located in States other than West Virginia derived from [fol. 112] business done in States other than West Virginia;

(H) That portion of your petitioner's intangible personal property consisting of cash on deposit in banks located in West Virginia derived from business done in States other than West Virginia.

3. The Circuit Court of Ohio County erred in refusing to hold invalid Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in their application to your petitioner, a Delaware corporation doing business in West Virginia and other States, and in construing said Sections to authorize the assessment for taxation in and by West Virginia of all your petitioner's intangible personal property, except that portion thereof which may have been taxed in and by States other than West Virginia, since said Sections, when read in connection with Section 15 of said Article and Chapter, which limits the assessment for taxation of similar property owned by an individual or unincorporated firm to money derived from or belonging to and credits arising out of business done by such individual or unincorporated firm within the State of West Virginia, operate to deny your petitioner the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the United States Constitution.

Wherefore your petitioner prays in accordance with Chapter 11, Article 3, Section 25 of the Code of West Virginia, that a writ of error may be granted from said judgment and order of the Circuit Court of Ohio County, entered on the 8th day of July, 1935, and that upon a hearing of this cause said judgment and order may be reviewed and reversed and that this Honorable Court enter such decree and order as the Circuit Court of Ohio County should have entered in this cause.

[fols. 113 & 114] And your petitioner will ever pray, etc.

Wheeling Steel Corporation, by Wright Hugus, J. E. Bruce, Its Attorneys.

Certificate of Counsel

I, the undersigned, an attorney duly qualified to practice in the Supreme Court of Appeals of West Virginia, do hereby certify that in my opinion the judgment complained of ought to be reviewed.

J. E. Bruce.

[fols. 115 & 116] In Supreme Court of Appeals of West Virginia

Present: Hon. M. O. Litz, President; Hon. John H. Hatcher. Hon. Homer B. Woods. Hon. Haymond Maxwell. Hon. Jo. N. Kenna.

Wheeling Steel Corporation

vs.

Fred L. Fox, State Tax Commissioner, et al.

Order Refusing Writ of Error—September 3, 1935

This day came Wheeling Steel Corporation, by Wright Hugus, and J. E. Bruce, its attorneys, and presented to the Court a petition praying for a writ of error to a judgment of the Circuit Court of Ohio County, rendered on the 8th day of July, 1935, in a case in which said petitioner was plaintiff, and Fred L. Fox, State Tax Commissioner, and Karl G. Sailer, Assessor of Ohio County, were defendants, with a record of the judgment aforesaid accompanying the

petition, which being seen and inspected by the Court, the writ of error prayed for is refused.

A true copy. Attest.

Wm. B. Mathews, Clerk Supreme Court of Appeals of West Virginia.

[fol. 117] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Your petitioner, Wheeling Steel Corporation, appellant below, herein styled "appellant", respectfully shows:

That your petitioner is a Delaware corporation doing business in West Virginia and other states as a foreign corporation, having its general business offices in Wheeling, West Virginia.

That this proceeding was begun in the Circuit Court of Ohio County, West Virginia, by the appellant herein, appealing pursuant to a statutory provision from an assessment for taxation made by the Assessor of Ohio County, West Virginia, and the State Tax Commissioner of West Virginia upon the total intangible personalty owned by the appellant on January 1, 1933. The said Circuit Court of Ohio County reduced the assessment to an amount equalling the accounts receivable derived from shipments of material manufactured by appellant in West Virginia and shipped from its West Virginia plants to customers located both within and without the State of West Virginia, plus that portion of the money deposited in West Virginia banks allocable to West Virginia business upon the same basis. From this judgment of the Circuit Court, the State Tax Commissioner and the Assessor of Ohio County appealed to the Supreme Court of Appeals of West Virginia. In its briefs and in oral argument before said [fol. 118] Supreme Court of Appeals this appellant urged that the statutes of West Virginia under which the purported assessment was made and taxes sought to be imposed were invalid not only for reasons of general law

but also because they deprived this appellant of property without due process of law and denied to this appellant the equal protection of the laws, and were consequently repugnant to the provisions of Section 1 of the 14th Amendment to the United States Constitution.

That the Supreme Court of Appeals of West Virginia, upon consideration of said appeal, rendered its opinion, now reported in 177 S. E. 535, reversed the judgment of the Circuit Court of Ohio County, upheld the validity of the statutes involved and held that the entire business of the appellant had been so localized in West Virginia that its entire intangible property had acquired a prima facie situs for taxation in that State, stating that "there is no inhibition in the Federal Constitution against the taxation of such property by the State", and remanded the case to the said Circuit Court of Ohio County for further proceedings.

That pursuant to the remand further proceedings were had in said Circuit Court of Ohio County, and on July 8, 1935 the said Circuit Court entered its judgment order in conformity with the opinion and mandate of the Supreme Court of Appeals of West Virginia, aforesaid.

That your petitioner, believing itself aggrieved by said judgment order, made timely application to the Supreme Court of Appeals of West Virginia (the highest court of said state) for a Writ of Error to said Circuit Court of Ohio County, again urging that the said statutes of West Virginia were invalid and repugnant to the provisions of Section 1 of the 14th Amendment to the United States Constitution for reasons hereinabove stated. The petition for Writ of Error was denied by the Supreme Court of Appeals of West Virginia on the 3rd day of September, 1935, without opinion.

That in said cause there is drawn in question the validity of statutes of the State of West Virginia on the ground that said statutes are repugnent to the Constitution of the United States and the decision is in favor of their validity, notwithstanding your petitioner's contention that said statutes violate Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 119] That, therefore, in accordance with Section 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your peti-

tioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to wit, under Section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

ASSIGNMENT OF ERRORS

The errors upon which your petitioner claims to be entitled to an appeal are as follows:

1. The Circuit Court of Ohio County (and the Supreme Court of Appeals of West Virginia, in declining to review the judgment of said Circuit Court) erred in refusing to hold invalid Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in their application to this appellant, a Delaware corporation doing business in West Virginia and other States, since they tax property of this appellant outside the jurisdiction of the State of West Virginia and thus deprive this appellant of property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the United States Constitution.

2. The Circuit Court of Ohio County (and the Supreme Court of Appeals of West Virginia, in declining to review the judgment of said Circuit Court) erred in sustaining the validity of Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in their application to this appellant, a Delaware corporation doing business in West Virginia and other States, and in construing said Sections to authorize the assessment for taxation in and by West Virginia of

(A) Any portion of this appellant's intangible personal property;

(B) All of this appellant's intangible personal property except that portion thereof which may have been taxed in and by States other than West Virginia;

(C) That portion of this appellant's intangible personalty consisting of accounts and notes receivable derived from shipments of products manufactured in and shipped from plants located in States other than West Virginia;

[fol. 120] (D) That portion of this appellant's intangible personal property consisting of accounts and notes receiv-

able derived from shipments of products manufactured in and shipped from plants located in States other than West Virginia to customers located in States other than West Virginia;

(E) That portion of this appellant's intangible personal property consisting of accounts and notes receivable derived from shipments of products manufactured in and shipped from plants located in West Virginia to customers located in States other than West Virginia;

(F) That portion of this appellant's intangible personal property consisting of cash on deposit in banks located in States other than West Virginia;

(G) That portion of this appellant's intangible personal property consisting of cash on deposit in banks located in States other than West Virginia derived from business done in States other than West Virginia;

(H) That portion of this appellant's intangible personal property consisting of cash on deposit in banks located in West Virginia derived from business done in States other than West Virginia.

3. The Circuit Court of Ohio County (and the Supreme Court of Appeals of West Virginia, in declining to review the judgment of said Circuit Court) erred in refusing to hold invalid Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in their application to this appellant, a Delaware corporation doing business in West Virginia and other States, and in construing said Sections to authorize the assessment for taxation in and by West Virginia of all this appellant's intangible personal property, except that portion thereof which may have been taxed in and by States other than West Virginia, since said Sections, when read in connection with Section 15 of said Article and Chapter, which limits the assessment for taxation of similar property owned by an individual or unincorporated firm to money derived from or belonging to and credits arising out of business done by such indi-
[fol. 121] vidual or unincorporated firm within the State of West Virginia, operate to deny to this appellant the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the United States Constitution.

4. The Supreme Court of Appeals of West Virginia erred in denying this appellant's Petition for a Writ of Error.

That your petitioner has filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Circuit Court of Ohio County, West Virginia, the highest court of said State in which a decision in this case could be had, to the Supreme Court of the United States, in order that the decision and final judgment herein may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Circuit Court of Ohio County, West Virginia, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States as provided by law, and that an order be made touching the security to be required of the petitioner, and that the bond tendered by the petitioner be approved.

Wright B. Hugus, J. E. Bruce, Attorneys for Petitioner.

November 2, 1935.

Appeal refused this 2nd of November, 1935.

M. O. Litz, President of the Supreme Court of Appeals of West Virginia.

[fol. 121½] [Endorsed:] Circuit Court, Ohio Co. Filed Nov. 25, 1935. L. L. Nightengale, Clerk.

[fol. 122] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

Upon consideration of the petition of the Wheeling Steel Corporation, the appellant in the above entitled cause, for the allowance of an appeal to the Supreme Court of the

United States from the judgment of the Circuit Court of Ohio County, West Virginia, (Writ of Error having been denied by the Supreme Court of Appeals of West Virginia on September 3, 1935), accompanied by an assignment of errors and statement as to jurisdiction, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated July 8, 1935, of the Circuit Court of Ohio County, West Virginia, as prayed in said petition, and that the Clerk of the Circuit Court of Ohio County, West Virginia, shall, within forty (40) days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that security for costs on appeal be fixed at the sum of $500.

Charles E. Hughes, Chief Justice of the United States.

November 22d, 1935.

[Endorsed:] Filed and entered of Record Nov. 25, 1935. L. L. Nightengale, Clerk.

[fol. 123] Bond on appeal for $500.00, approved and filed Nov. 25, 1935, omitted in printing.

[fol. 124] Citation, in usual form, showing service on Homer A. Holt, filed Nov. 29, 1935, omitted in printing.

[fol. 125] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed Dec. 19, 1935

To the Clerk of the Circuit Court of Ohio County, West Virginia:

It is hereby stipulated by counsel for appellant and appellees that the whole of the record, W. H. [omitting duplications],* shall be included J. E. B. in the transcript to be certified and transmitted to the Supreme Court of the United States.

Wright Hugus, J. E. Bruce, Counsel for Appellant, Wheeling Steel Corporation. Homer A. Holt, Attorney General of the State of West Virginia, Counsel for the Appellees, Fred L. Fox, etc., et al.

December 16th, 1935.

[File endorsement omitted.]

[fol. 126] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 127] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Dec. 28, 1935

Comes now the Appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record as filed, but

---

[*Words in brackets erased in copy.]

omitting duplications, is necessary for the consideration of the case.

Wright Hugus, J. E. Bruce, Counsel for Appellant.

Dec. 16th, 1935.

Service acknowledged this 16th day of December, 1935.

Homer A. Holt, Attorney General of the State of West Virginia, for Fred L. Fox, State Tax Commissioner, et al., Appellees. Address: Capitol Building, Charleston, West Virginia.

[fol. 128] [File endorsement omitted.]

Endorsed on cover: File No. 40,217. West Virginia, Circuit Court of Ohio County. Term No. 663. Wheeling Steel Corporation, appellant, vs. Fred L. Fox, State Tax Commissioner of West Virginia, and Karl G. Sailer, Assessor of Ohio County, West Virginia. Filed December 28, 1935. Term No. 663, O. T., 1935.

FILE COPY

DEC 28 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 663

WHEELING STEEL CORPORATION, A CORPORATION.
Appellant,

vs.

FRED L. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, AND KARL G. SAILER, ASSESSOR OF OHIO COUNTY, WEST VIRGINIA,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA.

STATEMENT AS TO JURISDICTION.

WRIGHT HUGUS,
J. E. BRUCE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 663

WHEELING STEEL CORPORATION, A CORPORATION.
Appellant,

vs.

FRED L. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, AND KARL G. SAILER, ASSESSOR OF OHIO COUNTY, WEST VIRGINIA,

Appellees.

STATEMENT AS TO JURISDICTION.

Wheeling Steel Corporation, appellant herein, appellant below, respectfully submits the following statement of the basis on which it contends that the Supreme Court of the United States has jurisdiction to review upon appeal a final judgment of the Circuit Court of Ohio County, West Virginia, entered in said cause on July 8, 1935, with respect to the taxation of intangible properties of appellant, its petition for Writ of Error having been timely filed in the Supreme Court of Appeals of West Virginia (the highest court of said State) and considered and denied by said Supreme Court of Appeals on September 3, 1935.

I.

Statutory Provisions Sustaining Jurisdiction.

The Federal statutory provision relied upon by appellant to sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Ohio County, West Virginia, on appeal, is Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925 (now Section 344 (a) of Title 28 of the U. S. C.), and as further amended or modified by the Acts of January 31, 1928, and April 26, 1928 (now Sections 861-a and 861-b of Title 28 of U. S. C., Sup. VI)..

II.

State Statutes Involved.

In both oral and printed argument before the state courts, the appellant herein, a corporation organized and existing under the laws of the State of Delaware, pointed out that Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, if construed by the Court to assess for taxation in and by West Virginia all of the appellant's intangible personalty, were repugnant to the provisions of Section 1 of the 14th Amendment to the United States Constitution forbidding the taking of property without due process of law.

Said Section 12, Article 3, Chapter 11, as amended by Chapter 38 of the Acts of the Legislature, 1933, Extraordinary Session, reads as follows:

> "(12) ASSESSMENT OF CORPORATE PROPERTY; REPORTS TO ASSESSOR BY CORPORATIONS.—Each incorporated company foreign or domestic having its principal office or chief place of business in this State, or owning property subject to taxation in this State, except railroad,

telegraph and express companies, telephone companies, pipe line, car line companies and other public utility companies, banking institutions, national banking associations and industrial loan companies, shall annually, between the first day of the assessment year and the first day of May, make a written report, verified by the oath of the president or chief accounting officer, to the assessor of the county in which its principal office or chief place of business is situated, showing the following items, viz: (a) The amount of capital authorized to be employed by it; (b) the amount of cash capital paid on each share of stock; (c) the amount of money on hand or on deposit anywhere subject to its check or draft, on the first day of the assessment year; (d) the amount of credits and investments other than its own capital stock held by it on said date, with their true and actual value; (e) the quantity, location and true and actual value of all of its real estate, and the magisterial district or districts in which it is located; (f) the kinds, quantity and true and actual value of all its tangible property in each magisterial district in which it is located.

"The oath required for this section shall be substantially as follows, viz:

STATE OF WEST VIRGINIA,
County of ——, ss:

I, —— ——, president (treasurer or manager) of (here insert name of corporation), do solemnly swear (or affirm) that the foregoing is, to the best of my knowledge and judgment, true in all respects; that it contains a statement of all the real estate and personal property, including moneys, credits and investments belonging to said corporation; that the value affixed to such property is, in my opinion, its true and actual value, by which I mean the price at which it would sell if voluntarily offered for sale on such terms as are usually employed in selling such property, and not the price which might be realized at a forced or auction sale; and said corporation has not, to my knowledge,

during the sixty-day period immediately prior to the first day of the assessment year converted any of its assets into nontaxable securities or notes or other evidence of indebtedness for the purpose of evading the assessment of taxes thereon; so help me, God.

——— ———.

"The officer administering such oath shall append thereto the following certificate, viz:

Subscribed and sworn to before me by ——— ———, this the — day of ———, 19—.

——— ———."

Said Section 13, Article 3, Chapter 11, as it appears in the Official Code of 1931, reads as follows:

"(13) Entry of Corporate Property by Assessor. —Upon receiving the verified report required by the preceding section, the assessor, if satisfied with the correctness thereof, shall assess the value of all the property of such corporation liable to taxation, and enter the same as follows, viz: All property in item (e) shall be entered with its valuation in the land books of the county, and in the magisterial district in which the real estate is situated; all property mentioned in items (c) and (d) shall, together with their valuation, be entered in the personal property book of the county, and in the magisterial district wherein is the principal office or chief place of business of such corporation, under the appropriate heads; and all property mentioned in item (f) shall, together with its valuation, be entered in the personal property book of the county, and in the magisterial district wherein such property is on the first day of the assessment year; the property mentioned in items (c), (d), (e) and (f) shall constitute all the property on which any such corporation shall be liable to pay taxes. If a company have branches, each branch shall be assessed separately in the county and magisterial district where its principal office for transacting its financial concerns is located; or, if there be no such office, then in the magisterial

district where its operations are carried on. All locks and dams of navigation companies shall be assessed and taxed as real estate in the county and magisterial district wherein they are situated; and in case such locks and dams are located on any creek or river which is the dividing line between counties, or the dividing line between magisterial districts of the same county, one-half of the value thereof shall be assessed in each of such counties or magisterial districts, as the case may be; when the property of an incorporated company is assessed as aforesaid, no individual shareholder therein shall be required to list or be assessed with his share, portion or interest in the capital stock of such corporation."

Appellant also contended that Section 1 of Article 5 of Chapter 11 of said Code should be considered in connection with said Sections 12 and 13 of Article 3 of Chapter 11.

Said Section 1, Article 5, Chapter 11, as amended by Chapter 40 of the Acts of the Legislature, 1933, reads as follows:

"(1) WHAT PERSONAL PROPERTY TAXABLE.—All personal property belonging to persons residing in this State, whether such property be in or out of the State, and all personal property in the State, though owned by persons residing out of the State, shall be entered in the personal property book, and be subject to equal and uniform taxation, except as classified in section four, article eight of this chapter, unless especially exempted by law; but personal property of all classes, except as hereinbefore provided, belonging to the residents of this State, which is actually and permanently located in another state, and by the laws of such other state is subject to taxation and is actually taxed in such other state, shall not be entered on the personal property book, or be taxed in this State. But the shares of capital stock owned by residents of this State in corporations actually located in other states, and whose property is taxed by the laws of such other

state, shall not be required to be listed for taxation. All moneys belonging to citizens of this State, and loaned to any person or deposited out of the State, shall be subject to taxation the same as if loaned or deposited in this State. Any person who at any time before the assessment year transfers by loan, deposit or gift, any money, notes, bonds, bills and accounts receivable, stocks and other intangible personal property, which are subject to taxation to anyone, who does not return a list of taxation as of the day on which the assessment year commences including such property, transfers, loans, deposits or gifts, if made with the intention of evading taxation, shall be deemed and treated as illegal and fraudulent and the assessor shall assess such property for taxation to the party who makes such transfers, loans, deposits or gifts as aforesaid."

Appellant likewise pointed out that said Sections 12 and 13 of Article 3 of Chapter 11 of said Code, when read in connection with Section 15 of Article 3 of Chapter 11, operated to deny to this appellant the equal protection of the laws and consequently were invalid under the provisions of said Section 1 of the 14th Amendment to the United States Constitution.

Said Section 15, Article 3, Chapter 11 as amended by Chapter 40 of the Acts of the Legislature, 1933, reads as follows:

"(15) ASSESSMENT OF CAPITAL USED IN TRADE OR BUSINESS BY NATURAL PERSONS.—The value of the capital used by any individual or firm not incorporated, in any trade or business taxable by law, shall be ascertained in the following manner: The owner, agent, or chief accountant of every such trade or business, except the business of agriculture, carried on in any county of the State, shall, annually, between the first day of the assessment year and the first day of May of the current year, make a written report as of the

first day of the assessment year, to the assessor, verified by his affidavit, showing the following matters and things, viz: (a) The amount, the true and actual value and classification of all tangible personal property used in connection with such trade or business, otherwise than such as is regularly kept for sale therein, including chattels real; (b) the true and actual value and classification of all goods and property kept for sale and remaining unsold; (c) the amount of all money derived from or belonging to such trade or business, on hand or remaining uninvested on that day, whether in or out of the State, payable to such individual or firm; (d) the amount in value of all credits arising out of any such business and remaining unpaid on that date, whether due or not, and whether in or out of the State; (e) the amount and "true and actual value of all money, notes, bonds, bills, accounts receivable, stocks and other intangible property made by such person or firm whether in or out of the State, other than those hereinbefore specified; (f) the location, quantity, the true and actual value and classification of all real estate owned by such individuals or firm and used in such trade or business. The assessor shall, upon the receipt of such report, properly verified, if he is satisfied with the correctness thereof, enter the real estate in the landbook of the county in the district wherein the same is situated, and assess the same with taxes, if not otherwise assessed, to the owner thereof; the personal property mentioned in such report he shall enter in the personal property book of his county for assessment with taxes as follows, viz: Items (a) and (b) shall be entered in the magisterial districts where they are for the greater part of the year kept or located; and items (c) and (d), (e) and (g) shall be entered under their appropriate headings, in the municipality or magisterial district wherein the principal place of business of such individual or firm is; if the assessor is not satisfied with the correctness of such report he may proceed to ascertain a correct list of the property on which such

individual or firm is liable to be assessed with taxes, and to value the same as in other cases; the person making such report shall take and subscribe an oath in substantially the following form:

I, —— ——, do solemnly swear (or affirm) that the foregoing list is true and correct to the best of my knowledge; that the value affixed to the property therein listed I believe to be the true and actual value thereof; that none of the assets belonging to (here state the name of individual or firm) and used in the business of (here describe the business) have to my knowledge, since the first day of the assessment year, been converted into nontaxable securities for the purpose of evading the assessment of taxes thereon; so help me, God.

—— ——.

"The officer administering said oath shall append thereto the following certificate, viz:

"Subscribed and sworn to before me by (here insert affiant's name) this — day of ——, 19—.

—— ——."

III.

Nature of the Case and of the Rulings of the Court.

This case was submitted on an agreed statement of facts. The questions involved are:

(1) Whether or not the appellant, which is a Delaware corporation doing business as a foreign corporation in West Virginia and other States, having its general offices in West Virginia and manufacturing plants in both West Virginia and Ohio, approximately 73% in value of its manufacturing properties, real estate and tangible personal property being located outside West Virginia and approximately 76% in value of its products during the preceding year

having been manufactured in and shipped from plants located outside West Virginia, is deprived of property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the United States Constitution, upon being held subject to a property tax in West Virginia upon all of its cash on deposit in banks located both within and without the State of West Virginia on January 1, 1933, including cash derived from sales of goods manufactured in and shipped from its plants in States other than West Virginia, and upon all of its accounts and notes receivable owned on that date, including those derived from shipments of material manufactured in and shipped from its plants located in other States, except upon that portion of said intangible personalty which may have been taxed in the State of Ohio.

(2) Whether or not the appellant, a Delaware corporation doing business in West Virginia and other states, is denied the equal protection of the laws, guaranteed to it by Section 1 of the Fourteenth Amendment to the United States Constitution, upon being held subject to a property tax in West Virginia upon all of its intangible personalty, except upon that portion thereof which may have been taxed in other states, in view of Section 15 of Article 3 of Chapter 11 of the West Virginia Code, *supra,* which provides that the only intangible personalty owned by an individual or unincorporated firm engaged in trade or business in West Virginia subject to the same property tax in West Virginia shall be "(c) the amount of all money derived from or belonging to" and "(d) the amount in value of all credits arising out of" the trade or business carried on in West Virginia by such individual or unincorporated firm.

This proceeding was begun in the Circuit Court of Ohio County, West Virginia, by the appellant herein, appealing pursuant to a statutory provision from an assessment for

taxation made by the Assessor of Ohio County and the State Tax Commissioner of West Virginia upon the total intangible personalty owned by the appellant on January 1, 1933. The said Circuit Court of Ohio County reduced the assessment to an amount equalling the accounts receivable derived from shipments of material manufactured by appellant in West Virginia and shipped from its West Virginia plants to customers located both within and without the State of West Virginia, plus that portion of the money deposited in West Virginia banks allocable to West Virginia business upon the same basis. From this judgment of the Circuit Court the State of West Virginia appealed to the Supreme Court of Appeals of West Virginia. In its briefs and in oral argument before said Supreme Court of Appeals this appellant urged that said Sections 12 and 13, *supra,* under which the purported assessment was made and taxes sought to be imposed were invalid not only for reasons of general law but also because they deprived this appellant of property without due process of law and denied to this appellant the equal protection of the laws, and were consequently repugnant to the provisions of Section 1 of the 14th Amendment to the United States Constitution.

Points III and IV of this appellant's Brief before the Supreme Court of Appeals of West Virginia read as follows:

> "III. If said sections direct the assessment for taxation of all the intangible personal property of this taxpayer, said sections are in contravention of Article 10, Section 1 of the Constitution of West Virginia, and deny to this taxpayer the equal protection of the laws."
>
> "IV. If the statutes of West Virginia purport to tax all the intangible personal property of this taxpayer, then said statutes are in contravention of the Fourteenth Amendment to the Constitution of the United States, for

"(A) Multiple taxation of intangibles and taxation by a state of property outside its jurisdiction are deprivations of property without due process of law.

"(B) Unless intangible personal property has acquired a business situs elsewhere, such property is taxable only at the domicile."

The Supreme Court of Appeals of West Virginia, upon consideration of said appeal, rendered its opinion, now reported in 177 S. E. 535, under the caption "In re Wheeling Steel Corporation Assessment," reversed the judgment of the Circuit Court of Ohio County, upheld the validity of the statutes involved and held that the entire business of the appellant had been so localized in West Virginia that its entire intangible property had acquired a prima facie situs for taxation in that State, stating that "there is no inhibition in the Federal Constitution against the taxation of such property by the State," and remanded the case to the said Circuit Court of Ohio County for further proceedings.

The agreed statement of facts set forth that the State of Ohio taxed intangible property of this appellant to the extent of $250,133.42 during the same tax period. The Supreme Court of Appeals of West Virginia in its opinion held that the said sum of $250,133.42 should be deducted from the agreed total intangible property owned by the appellant, that intangibles taxed by any other State should likewise be deducted, and that the remainder should be assessed for taxation in West Virginia.

In its petition for rehearing duly and timely filed in said Supreme Court of Appeals of West Virginia, this appellant urged among other things that

"(B) The statutes of West Virginia operate to deny to this taxpayer the equal protection of the laws, in contravention of the 14th Amendment to the Constitution of the United States."

and that

> "The taxation of all of taxpayer's intangibles other than those upon which a tax is paid in the State of Ohio is a taking of taxpayer's property without due process of law in contravention of the 14th Amendment to the Constitution of the United States."

Said petition for rehearing was denied on the 8th day of January, 1935. An application for appeal to the Supreme Court of the United States was presented to and denied by the Presiding Judge of the Supreme Court of Appeals of West Virginia on the 5th day of March, 1935, and was then presented to and denied by the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, on the 6th day of March, 1935, for the reason that "no final judgment is shown."

Thereafter, pursuant to said remand, further proceedings were had in said Circuit Court of Ohio County, and on July 8, 1935, the said Circuit Court entered its judgment order in conformity with the opinion and mandate of the Supreme Court of Appeals of West Virginia, aforesaid.

The appellant herein made timely application to the Supreme Court of Appeals of West Virginia for a Writ of Error to the judgment of the Circuit Court of Ohio County, again urging the federal questions aforesaid. The petition for Writ of Error was denied by the Supreme Court of Appeals of West Virginia on the third day of September, 1935, without opinion.

IV.

The Petition for Appeal.

A petition for appeal to the Supreme Court of the United States was presented to and denied by the Presiding Judge of the Supreme Court of Appeals of West Virginia on the 2nd day of November, 1935. This application is being pre-

sented to the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, on the 22nd day of Nov., 1935.

V.

The Judgment Order Entered by the Circuit Court of Ohio County is Final and Appealable under Applicable Statutes.

The Supreme Court of Appeals of West Virginia is the highest court of West Virginia in which the final order entered by the Circuit Court of Ohio County could have been reviewed. As hereinbefore stated, the said Supreme Court of Appeals denied this appellant's petition for Writ of Error filed in this case. Therefore the Circuit Court of Ohio County is the highest court of the State in which a decision could be had.

The following cases support the finality of the judgment:

Virginia Railway Company v. *Mullens,* 271 U. S. 220, 70 L. Ed. 915;

Salomon v. *State Tax Commission of New York,* 278 U. S. 484, 73 L. Ed. 464;

Western Union Tel. Company v. *Crovo,* 220 U. S. 364, 55 L. Ed. 498.

VI.

Cases Believed to Sustain Jurisdiction.

The following decisions are believed to sustain jurisdiction of this appeal:

Frick v. *Pennsylvania,* 268 U. S. 473, 69 L. Ed. 1058;

Safe Deposit & Trust Co. v. *Virginia,* 280 U. S. 83, 74 L. Ed. 180;

Farmers Loan and Trust Co. v. *Minnesota,* 280 U. S. 204, 74 L. Ed. 371;

Baldwin v. *Missouri*, 281 U. S. 586, 74 L. Ed. 1056;
Beidler v. *South Carolina Tax Commission*, 282 U. S. 1, 75 L. Ed. 131;
First National Bank of Boston v. *Maine*, 284 U. S. 312, 76 L. Ed. 313;
Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 203, 69 L. Ed. 916;
Hans Rees' Sons, Inc. v. *North Carolina*, 283 U. S. 123, 75 L. Ed. 879;
Liverpool & L. & G. Insurance Co. v. *Board of Assessors*, 221 U. S. 346, 55 L. Ed. 762;
Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32, 72 L. Ed. 770;
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927;
Buck v. *Beach*, 206 U. S. 392, 51 L. Ed. 1106.
Blodgett v. *Silberman*, 277 U. S. 1, 72 L. Ed. 749.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (now section 344 (a) of Title 28 of the U. S. C.), and as further amended or modified by the Acts of January 31, 1928 and April 26, 1928 (now sections 861-a and 861-b of Title 28 of U. S. C., Sup. VI).

Respectfully submitted,

WRIGHT HUGUS,
J. E. BRUCE,
Attorneys for Wheeling Steel Corporation, Appellant.

(7266-C)

FILE COPY

No. 663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

WHEELING STEEL CORPORATION (a corporation),
APPELLANT,

vs.

FRED L. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, AND KARL G. SAILER, ASSESSOR OF OHIO COUNTY, WEST VIRGINIA,
APPELLEES.

BRIEF FOR APPELLANT

On the Brief:
RUSSELL A. KLIEVES,
HARRY R. HESSE.

WRIGHT HUGUS,
J. E. BRUCE,
Counsel for Appellant.

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of similar property owned by an individual or unincorporated firm to money derived from or belonging to and credits arising out of business done by such individual or unincorporated firm within the State of West Virginia, operate to deny to this appellant the equal protection of the laws. ---------- 40

B. Said Sections, when read in connection with Sections 2, 4, 5, 6 and 7, Article 6, Chapter 11 of the Code, which limit the assessment for taxation of similar property owned by persons, firms or corporations operating as public utilities to property "wholly held or used in this State", operate to deny to this appellant the equal protection of the laws. ---------- 45

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No. 663

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FRED L. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, AND KARL G. SAILER, ASSESSOR OF OHIO COUNTY, WEST VIRGINIA,
APPELLEES.

BRIEF FOR APPELLANT

This case is on appeal from a judgment of the Circuit Court of Ohio County, West Virginia, which held that the appellant, a Delaware corporation, owning property and doing a manufacturing business in West Virginia and other states, is subject to a property tax in West Virginia upon its total intangible property, except that portion thereof which is actually taxed elsewhere during the same tax period. The Supreme Court of Appeals of West Virginia, which is the highest court of said State, refused to review the judgment in question.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Circuit Court of Ohio County, West Virginia, delivered at the time the original judgment order of that Court was handed down, is reported in The Corporation Tax Service for West Virginia, published by The Corporation Trust Company, page 2540, paragraph 2411, under the caption "Matter of Wheeling Steel Corporation", and is included in the record herein at pages 47 to 61.

The opinion of the Supreme Court of Appeals of West Virginia is reported "In re Wheeling Steel Corporation Assessment," _____ W. Va. _____, 177 S. E. 535, and is included in the record herein at pages 62 to 66.

THE JURISDICTION OF THIS COURT

The appellant has heretofore filed the Statement as to Jurisdiction on appeal required by paragraph 1 of Rule 12.

STATEMENT OF THE CASE

This case was submitted upon an agreed statement of facts (R. 1-13), upon agreed facts embodied in an order of the Circuit Court of Ohio County (R. 14-15) and upon an Additional Stipulation (R. 70-72).

The Appellant and its Business.

The appellant was on January 1, 1933 and is now a Delaware corporation engaged in the manufacture of steel and steel products. It maintains the usual statutory office in that State, and pays the taxes required by the laws of Delaware to be paid by a domestic corporation (R. 3).

At the time of the assessment complained of, January 1, 1933, the appellant was qualified to do business in West

Virginia and other states as a foreign corporation. While it had its general business offices in Wheeling, Ohio County, West Virginia, where the management functioned and such records were kept as are customarily kept at a general office, its principal manufacturing plants were located in the State of Ohio. During the year preceding the assessment complained of, shipments from the appellant's plants located outside of West Virginia, principally in Ohio, totalled $13,787,742.25, which constituted 75.80% of its total shipments. Sales offices were located in major cities throughout the country, orders and contracts being subject to acceptance or rejection at Wheeling. Other offices were mainained and records kept at the various plants and some of its corporate functions were performed in Delaware and New York. (R. 3-8).

On January 1, 1933, the date of the assessment of intangible personalty herein involved, the assessed value of the appellant's real estate and tangible personal property in West Virginia was only 27.10% of the assessed value of its total real estate and tangible personal property (R. 6).

Other bases for comparison beween activities of the appellant carried on in West Virginia and outside West Virginia appear at pages 7 and 8 of the Record herein.

On January 1, 1933 — the date of the assessment involved herein — the appellant had on deposit to its credit in various banks the sum of $2,307,773.61, of which the sum of $849,161.99 was in West Virginia banks (R. 11).

The sum of $53,072.63, included within said sum of $849,161.99, had been received by appellant on account of sales of goods sold and manufactured in and shipped from West Virginia to purchasers resident in West Virginia. The sum of $68,612.28, likewise included in said sum of

$849,161.99, had been received by appellant on account of goods sold and manufactured in West Virginia but shipped to purchasers resident in states other than West Virginia. The remainder of said sum of $849,161.99 on deposit in West Virginia had been received by appellant from sales of goods manufactured in and shipped from points outside West Virginia (R. 15).

The total amount of accounts and notes receivable due the appellant on said January 1, 1933, was $2,234,743.11 (R. 12).

The sum of $302,100.42, included within said sum of $2,234,743.11, was the amount of receivables due appellant on January 1, 1933, for goods sold and manufactured in and shipped from West Virginia to non-residents of West Virginia, and the sum of $72,310.00, likewise included within said sum of $2,234,743.11, was the amount of receivables due appellant on said date for goods sold and manufactured in and shipped from West Virginia to residents of West Virginia (R. 14-15).

The Statutes Involved.

The West Virginia statutes, insofar as they are relevant to this case, contain the following provisions:

Chapter 11, Article 3, Section 12 of the Code of West Virginia as amended by Chapter 38 of the Acts of the Legislature, 1933, Extraordinary Session, (Michie 1933 Supplement, Section 681) provides that "Each incorporated company foreign or domestic having its principal office or chief place of business in this State, or owning property subject to taxation in this State_____" shall annually make a written report showing inter alia the following items:

> "(c) the amount of money on hand or on deposit anywhere subject to its check or draft, on the first day of the assessment year;

"(d) the amount of credits and investments other than its own capital stock held by it on said date; with their true and actual value; ----------"*

(The only material change in this Section made by the 1933 Amendment was the omission of the privilege of deducting indebtedness when reporting for taxation money, credits and investments owned by the taxpayer (R. 52-54). The Supreme Court of Appeals of West Virginia held, in **Union Mortgage Investment Co. v. Fox, ---- W. Va. ----,** 175 S. E. 217, that the 1933 Amendment applied to the assessment year beginning January 1, 1933.)

Chapter 11, Article 3, Section 13 of said Code (Michie 1932 Code, Section 682) provides that the assessor, upon receiving the report above-mentioned, if satisfied with the correctness thereof, "shall assess the value of all the property of said corporation liable to taxation," and that "all property mentioned in items (c) and (d) shall, together with their valuation, be entered in the personal property book of the county, and in the magisterial district wherein is the principal office or chief place of business of such corporation-------"*

Chapter 11, Article 5, Section 1 of said Code as amended by Chapter 40 of the Acts of Legislature, 1933, (Michie 1933 supplement, Section 716) defines the personal property subject to taxation in West Virginia.* (The 1933 Amendment made no change in this Section material to this case.)

Chapter 11, Article 3, Section 15 of said Code, as amended by Chapter 40 of the Acts of the Legislature, 1933 (Michie 1933 Supplement, Section 684) provides for the assessment of property used in trade or business by natural

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*The full text of this section of the West Virginia Code is printed in the Appendix hereto.

persons.* (The 1933 Amendment made no change material to this case.)

Chapter 31, Article 1, Section 79 of the Official Code of West Virginia of 1931 (Michie 1932 Code, Section 3091) prescribes the conditions under which foreign corporations are permitted to hold property and transact business in that State.*

Chapter 11, Article 12, Section 71 of said Official Code (Michie 1932 Code, Section 939) provides that the license tax payable by a foreign corporation doing business in the State shall be at the rate prescribed for domestic corporations, "plus fifty per cent of such tax".*

Chapter 11, Article 6, Section 2 of the Official Code of West Virginia of 1931 (Michie 1932 Code, Section 728) provides that railroad companies shall report for taxation "(f) personal property, of every kind whatsoever, including money, credits and investments wholly held or used in this State, showing the amount and value thereof in each county;-----"*

The Tax in Dispute.

The appellant filed with the assessor of Ohio County, West Virginia, as required by Chapter 11, Article 3, Section 12 of the Code, **supra,** its property tax return for the assessment year beginning January 1, 1933 (R. 9). Having been advised by counsel that the total of its bank deposits and the total of its accounts and notes receivable were not taxable in West Virginia, and since the West Virginia statutes did not prescribe how the portion of such property taxable in West Virginia should be determined, the appellant devised its own methods of allocation.

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*The full text of this section of the West Virginia Code is printed in the Appendix hereto.

Appellant reported as the amount of cash taxable in West Virginia that proportion of its total cash which the sum of its West Virginia payrolls and West Virginia purchases during 1932 bore to its total payrolls and purchases during that year (R. 12).

Appellant reported as the amount of accounts and notes receivable taxable in West Virginia only those accounts and notes receivable owed to it by residents of West Virginia (R. 13).

The assessor of Ohio County rejected this report, insofar as it purported to be a return of intangible personal property for taxation, and assessed the appellant upon its total cash in banks and total accounts and notes receivable. Upon statutory appeal to the State Tax Commissioner, that official upheld the action of the assessor, with minor variations, and directed that the appellant be assessed for taxation upon its total intangible personal property.

The appellant thereupon appealed to the Circuit Court of Ohio County, West Virginia, which, upon consideration of such appeal, reduced the assessment to an amount equalling the accounts and notes receivable derived from shipments of material manufactured by appellant in West Virginia and shipped from its West Virginia plants to customers located both within and without the State of West Virginia, plus that portion of the money deposited in West Virginia banks allocated to West Virginia business upon the same basis (R. 60).

From this judgment of the Circuit Court the State Tax Commissioner and the Assessor of Ohio County appealed to the Supreme Court of Appeals of West Virginia. The said Supreme Court of Appeals reversed the judgment of the Circuit Court of Ohio County and held that the entire business of the appellant had been so localized in West Vir-

ginia that its entire intangible property had acquired a prima facie situs for taxation in that state, permitted the deduction of appellant's intangible property taxed in the State of Ohio during the same tax period and remanded the case to the said Circuit Court of Ohio County for further proceedings (R. 62-67).

Pursuant to said remand further proceedings were had in said Circuit Court of Ohio County and thereupon the said Circuit Court entered the judgment order dated July 8, 1935 (R. 67-69) which is the subject of this appeal. The appellant applied to the Supreme Court of Appeals of West Virginia for a Writ of Error to said judgment but its petition was denied by said Court without opinion.

SPECIFICATION OF THE ASSIGNED ERRORS INTENDED TO BE URGED.

The appellant has heretofore adopted its assignments of error as its statement of the points to be relied upon, in conformity with Rule 13 (R. 84-85). Assignments of error were duly filed (R. 75). The following are the assigned errors intended to be urged:

1. The Circuit Court of Ohio County (and the Supreme Court of Appeals of West Virginia, in declining to review the judgment of said Circuit Court) erred in refusing to hold invalid Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in their application to this appellant, a Delaware corporation doing business in West Virginia and other States, since they tax property of this appellant outside the jurisdiction of the State of West Virginia and thus deprive this appellant of property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the United States Constitution.

2. The Circuit Court of Ohio County (and the Su-

preme Court of Appeals of West Virginia, in declining to review the judgment of said Circuit Court) erred in sustaining the validity of Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in the application to this appellant, a Delaware corporation doing business in West Virginia and other States, and in construing said Sections to authorize the assessment for taxation in and by West Virginia of

(A) Any portion of this appellant's intangible personal property;

(B) All of this appellant's intangible personal property except that portion thereof which may have been taxed in and by States other than West Virginia;

(C) That portion of this appellant's intangible personalty consisting of accounts and notes receivable derived from shipments of products manufactured in and shipped from plants located in States other than West Virginia;

(D) That portion of this appellant's intangible personal property consisting of accounts and notes receivable derived from shipments of products manufactured in and shipped from plants located in States other than West Virginia to customers located in States other than West Virginia;

(E) That portion of this appellant's intangible personal property consisting of accounts and notes receivable derived from shipments of products manufactured in and shipped from plants located in West Virginia to customers located in States other than West Virginia;

(F) That portion of this appellant's intangible personal property consisting of cash on deposit in banks located in States other than West Virginia;

(G) That portion of this appellant's intangible personal property consisting of cash on deposit in banks located in States other than West Virginia derived from business done in States other than West Virginia;

(H) That portion of this appellant's intangible personal property consisting of cash on deposit in banks located in West Virginia derived from business done in States other than West Virginia.

3. The Circuit Court of Ohio County (and the Supreme Court of Appeals of West Virginia, in declining to review the judgment of said Circuit Court) erred in refusing to hold invalid Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in their application to this appellant, a Delaware corporation doing business in West Virginia and other States, and in construing said Sections to authorize the assessment for taxation in and by West Virginia of all this appellant's intangible personal property, except that portion thereof which may have been taxed in and by States other than West Virginia, since said Sections, when read in connection with Section 15 of said Article and Chapter, which limits the assessment for taxation of similar property owned by an individual or unincorporated firm to money derived from or belonging to and credits arising out of business done by such individual or unincorporated firm within the State of West Virginia, operate to deny to this appellant the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the United States Constitution.

4. The Supreme Court of Appeals of West Virginia erred in denying this appellant's Petition for a Writ of Error.

SUMMARY OF ARGUMENT

I. Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, as construed by the State Courts, are in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, for

A. Said Sections, as construed, operate to tax property over which the State has no jurisdiction.

B. Said Sections, as construed, result in multiple taxation.

C. Said Sections do not afford a statutory basis for taxation under the "business situs" theory.

II. Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, as construed by the State Courts, are in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, for

A. Said Sections, when read in connection with Section 15, Article 3 of Chapter 11, which limits the assessment for taxation of similar property owned by an individual or unincorporated firm to money derived from or belonging to and credits arising out of business done by such individual or unincorporated firm within the State of West Virginia, operate to deny to this appellant the equal protection of the laws.

B. Said Sections, when read in connection with Sections 2, 4, 5, 6 and 7, Article 6, Chapter 11 of the Code, which limit the assessment for taxation of similar property owned by persons, firms or corporations operating as public utilities to property "wholly held or used in this State", operate to deny this appellant the equal protection of the laws.

ARGUMENT

I. Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, as construed by the State Courts, are in violation of the Fourteenth Amendment to the United States Constitution, for

A. Said Sections, as construed, operate to tax property over which the State has no jurisdiction.

It is the general rule that a State may not tax property over which it has no jurisdiction. This rule is clear in its application to real estate and tangible personalty, but in view of the fact that intangibles have no situs, the courts have adopted rules varying with the facts in the particular cases before them.

It is the appellant's contention that the state creating a corporation has the sole right to tax the intangible property of that corporation unless such intangible property has acquired a "business situs" elsewhere, that is, that it has been derived from and is being held for use in a purely local business, and, conversely, that a state which is not the domicile of the taxpaying corporation, and in which the intangible property of such corporation has not acquired a "business situs", cannot, consistently with the due process clause of the Fourteenth Amendment, impose a tax upon such property.

Commonwealth of Virginia v. Imperial Coal Sales Company, Inc., (1934), 293 U. S. 15, L. Ed. 171;

Safe Deposit & Trust Co. v. Virginia, (1929), 280 U. S. 83, 74 L. Ed. 180;

Liverpool & L. & G. Ins. Co. v. Board, (1911), 221 U. S. 346, 55 L. Ed. 762;

Baldwin v. Missouri, (1930), 281 U. S. 586, 74 L. Ed. 1056.

The appellant further contends that the statutes of West Virginia and the facts herein do not afford a basis for the taxation of any of appellant's intangible property upon the "business situs" theory. This point is discussed hereinafter under Point IC.

West Virginia is not the domicile of the appellant. The appellant was organized and now exists under and by virtue of the laws of the State of Delaware. It operates in West Virginia, Ohio and Minnesota as a foreign corporation (R. 2), having complied with the laws of each of said states taxing and regulating foreign corporations doing business therein.

The laws of the State of West Virginia do not provide for the domestication of foreign business corporations. On the contrary, Chapter 31, Article 1, Section 79 (Michie 1932 Code, Section 3091) provides that foreign corporations may do business, as foreign corporations, within West Virginia under certain conditions. Foreign corporations doing business within the State preserve their status as foreign corporations. Chapter 11, Article 12, Section 71 (Michie 1932 Code, Section 939) illustrate that different methods are used in caluculating license taxes imposed on foreign, as distinguished from domestic, corporations, and that the policy of West Virginia is to maintain that distinction.

The appellees, in their briefs and arguments before the State Courts, and the Supreme Court of Appeals of West Virginia, in its opinion handed down herein (R. 62-66), took the position that, notwithstanding the facts that the appellant is a foreign corporation, that 72.90% if its real estate and tangible personal property is located outside West Virginia, and that 75.80% of its shipments in 1932 originated from its manufacturing plants located outside West Virginia, its entire business had been localized in West Virginia. The said Supreme Court of Appeals said (R. 65):

> "The facts agreed herein show that the management of the corporation radiates from Wheeling, and that the major part of its executive business is performed or initiated there. We are of the opinion that such a localization of the corporation's business at Wheeling imparts to its entire intangible property a prima facie situs for taxation at that place."

Such a decision overthrows the distinction between domestic and foreign corporations now existing in the law, and attempts to substitute therefor a distinction depending, apparently, upon the place where the executive and management functions are exercised. It transfers to the place of control at least one of the attributes of domicile — the power to tax the total intangible property of a corporate taxpayer irrespective of the fact that its real estate and tangible personal property may be located elsewhere.

From the Court's finding that all the property of the appellant is controlled by the executive offices in West Virginia, the State Court deduces that all the intangible personal property owned by the appellant, wherever it may be said to be located and however arising, except that portion actually taxed in other states, is taxable in and by West Virginia. It may just as well be argued that all the real property and all the tangible personal property owned by the appellant is likewise controlled by the West Virginia office, and, if the State Court's reasoning is correct, should also be amenable to assessment and taxation in West Virginia. But the State Court does not attempt to extend the argument to its logical conclusion. This argument, if extended to real and tangible personal property, would, of course, be met with the rule that taxation of such property outside the jurisdiction of the taxing authority is a deprivation of property without due process, in contravention of the Fourteenth Amendment to the United States Constituion.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. Ed. 150.

If taxation of real and tangible personal property located outside the jurisdiction of the taxing authority is deprivation of property without due process, the appellant maintains that the assessment and taxation of intangible personal property located and/or arising from business done outside the jurisdiction of the taxing authority is just as much an attempted deprivation of property without due process.

The appellant owns and operates manufacturing facilities both within and without the State of West Virginia. Only 27.10% of the assessed value of its real estate and tangible personal property is located in West Virginia. Only 24.20% of its shipments originated in West Virginia in 1932. Its West Virginia production was 15.6% of the total production in 1932. Only 19.45% of its employees were employed in West Virginia in 1932. Its West Virginia payrolls were only 16.22% of the total payrolls in 1932. Its West Virginia ingot capacity is only 16.6% of its total ingot capacity, and ingot capacity is a recognized basis of determining the producing ability of a steel company (R. 6-8).

It is clear that the larger portion of appellant's intangibles sought to be assessed and taxed by West Virginia was derived from operations carried on outside West Virginia. If intangibles can have any situs for taxation other than at the appellant's domicile in Delaware, such situs cannot be determined solely by control, for such a rule would result in taxation of property outside the jurisdiction of the State. The use of tangible property, both real and personal, in business, creates intangible property, and it is submitted that the only fair rule for the taxation of property in states other than the state of the domicile is a rule which allocates intangibles on the basis of tangible property owned and used in production of material

for sale. Such a rule will permit each state in which tangible property is located and operated for profit to tax a fair proportion of the intangible property created within its borders.

Let us suppose that this appellant, as it might well do, should acquire suitable office space in Ohio or Pennsylvania, and should move its general books and accounting records to such new office, and should thereafter conduct its business and control its property, including that property located in West Virginia, from Ohio or Pennsylvania. Since any intangible personalty located in or arising from operations conducted in West Virginia would then be "controlled" from an office located outside the State, could it be successfully maintained that such intangible personalty would not be taxable in and by West Virginia?

And let us suppose that there are two Delaware corporations owning property and doing business in West Virginia and in other states, one having its executive offices in West Virginia and the other in another state. Would the Fourteenth Amendment permit West Virginia to tax all the intangible personal property owned by the first corporation and none of the intangible personal property owned by the latter?

The State Court's decision will not stand analysis. Its position is the same as if it had said: "Since this Taxpayer performs executive functions in West Virginia, we will treat it, for the purpose of property taxation, as a domestic corporation, and assess all its intangible personalty for taxation in and by West Virginia, but in other matters, such as franchise taxes, we will treat it as a foreign corporation." The State Court attempts to enlarge the doctrine of "business situs" by drawing to West Virginia all the intangible personalty of a foreign corporation solely on the ground that the control is exercised within its borders.

It is well settled in the law that a corporation is domiciled in the state of its creation, and that it can-

not migrate. It may own property and do business in other states, but its domicile is not thereby changed. To hold that a corporation may have a roving domicile, dependent upon the place its executive functions are exercised from time to time, would be an anomaly. As long ago as 1897 Mr. Justice Brewer, in **Adams Express Co. v. Ohio State Auditor,** 165 U. S. 225, 41 L. Ed. 965, rejected the position taken by the State Courts in the instant case and, at page 224 of the U. S. reports, said:

> "It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was **'Mobilia personam sequuntur,'** but that maxim was never of universal application, and seldom interfered with the right of taxation, **Pullman's Palace Car Co. v. Pennsylvania,** 141 U. S. 18, 22 (35: 613, 616, 3 Inters. Com. Rep. 595). It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 "of intangible properly, for purposes of taxation, was changed from the state of New York to that of New Jersey."

The money and accounts receivable here sought to be taxed are property derived from business done for the most part in the State of Ohio (R. 14-15, items 3-8). The management activities in West Virginia, particularly the "control" emphasized by the State Court, did not create these intangibles. Appellant's business is not localized in West Virginia. Its general offices in Wheeling did not and could not bring into existence such intangibles without the acts of manufacture and shipment in and from the State of Ohio. The most important act — the manufacture of the steel — was performed in Ohio. No money would have been received, and no credits would have been created but for such manufacture. If intangibles arising from

the appellant's Ohio manufacturing operations are taxable in any state, other than Delaware, they are taxable in Ohio. They are not taxable in West Virginia.

Hans Rees' Sons, Inc. v. North Carolina, (1931), 283 U. S. 123, 75 L. Ed. 879;

American Barge Line Co. v. Board, (1933), 55 S. W. (2nd) 416 (Kentucky);

Looney v. Crane Co., (1917), 245 U. S. 178, 62 L. Ed. 230;

Alpha Portland Cement Co. v. Mass., (1925), 268 U. S. 203, 69 L. Ed. 916;

Baldwin v. Missouri, (1930), 281 U. S. 586, 74 L. Ed. 1056;

Beidler v. South Carolina Tax Commission, (1930), 282 U. S. 1, 75 L. Ed. 131;

First National Bank of Boston v. Maine, (1932), 284 U. S. 312, 76 L. Ed. 313.

There is one item of accounts receivable ($59,675.16) which the Circuit Court of Ohio County treated separately (R. 61 — Addendum) and which should be discussed briefly. This sum was owed to appellant by its employees for capital stock purchased by them. The appellant's local business is the manufacture of iron and steel within the State. Investment of surplus funds or, in this case, the extension of credit to its employees, not for the purpose of enabling them to buy iron and steel, but to enable them to purchase stock, cannot properly be said to be a part of its local business. If such receivables are taxable anywhere, they are taxable in Delaware, the domicile of the appellant. They are not taxable within both jurisdictions.

Baldwin v. Missouri, (1930), 281 U. S. 586, 74 L. Ed. 1056;

Rounds & Porter Lumber Co. v. Livesay, (1933), 66 Fed. (2nd) 298.

B. Said Sections, as construed, result in multiple taxation.

It will be noted that the cases hereinafter discussed involve not only property taxes, but also transfer, inheritance, license and income taxes, but it is submitted that the same general jurisdictional principles govern all types of taxation. The court in **Frick v. Pennsylvania,** (1925), 268 U. S. 473, 69 L. Ed. 1058, states that:

> "The tax which it (the Pennsylvania statute) imposes is not a property tax, but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the state. But, to impose either tax, the state must have jurisdiction over the thing that is taxed; and to impose either without such jurisdiction is mere extortion, and in contravention of due process of law."

The modern view of this Court, to the effect that multiple taxation of intangible personal property is repugnant to the due process clause of the Fourteenth Amendment, apparently had its inception in the case of **Safe Deposit & Trust Co. v. Virginia,** (1929), 280 U. S. 83, 74 L. Ed. 180, which denied to Virginia — the domicile of the creator of and cestuis under a trust consisting of stocks and bonds — power to impose a property tax upon the trust estate, on the ground that the securities were owned by and in possession of a trustee domiciled in Maryland. In the majority opinion of the Court, Mr. Justice McReynolds, discussing the maximum mobilia sequuntur personam, said:

> "It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two states at the same instant and because of

this to uphold a double and oppressive assessment."

That intangibles consisting of negotiable bonds and certificates of indebtedness issued by Minnesota and cities in Minnesota are subject to the imposition of an inheritance tax only by the State of the decedent's domicile — New York — was held in **Farmers Loan & Trust Co. v. Minnesota,** (1930), 280 U. S. 204, 74 L. Ed. 371. This case expressly overruled **Blackstone v. Miller,** 188 U. S. 189, 47 L. Ed. 439. Mr. Justice McReynolds, writing the majority opinion, at page 375 of 74 L. Ed., said:

> "While debts have no actual territorial situs we have ruled that a state may properly apply the rule "mobilia sequuntur personam" and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the state where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two states apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago Union Refrigerator Transit Co. v. Kentucky, supra, declared: "In view of the enormous increase of such property (tangible personalty) since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for the purpose of taxation and correlatively to exempt it at the domicile of the owner." And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting

theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

> "Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

The decision in **Baldwin v. Missouri,** (1930), 281 U. S. 586, 74 L. Ed. 1056, involved other types of intangible property. The State of Missouri had imposed transfer or inheritance taxes upon (1) cash on deposit in Missouri, (2) coupon bonds issued by the United States and (3) sundry promissory notes physically within that State, the majority of which had been executed by citizens of Missouri and were secured by liens upon lands lying therein. The owner died domiciled in Illinois. The Court, through Mr. Justice McReynolds, at page 1059 of 74 L. Ed., said:

> "Ordinarily, bank deposits are mere credits and for purposes of ad valorem taxation have situs at the domicile of the creditor only. The same general rule applies to negotiable bonds and notes whether secured by liens on real estate or otherwise."

and held that, although the bonds and notes were physically in Missouri, "they were not within Missouri for taxation purposes" and that State could not tax the transfer.

In **Baldwin v. Missouri** the Court had an opportunity to apply the "business situs" doctrine. The lower court had said: "It is a reasonable inference that the cash and notes in such large quantities in Missouri, when none of it was held in Illinois, was retained in this state for the purpose of investment." (page 1059 of 74 L. Ed.) But nevertheless the United States Supreme Court refused to follow this lead. Its failure to do so, in our opinion, shows a tendency to discard that theory of taxation. Mr. Justice Holmes, (in his dissenting opinion, page 1061), recognizes that the majority opinion in effect overrules the cases upholding "business situs" as a basis for taxation of intangible property.

In **Beidler v. South Carolina Tax Commission,** (1930), 282 U. S. 1, 75 L. Ed. 131, South Carolina had attempted to impose a transfer tax upon the transfer of open, unsecured indebtedness payable by a South Carolina corporation to the decedent, who died domiciled in Illinois. Mr. Chief Justice Hughes delivered the opinion of the Court, stating that (page 133 of 75 L. Ed.):

> "In reaching its conclusion as to the validity of the tax, the state court relied chiefly upon the decision of this court in Blackstone v. Miller, 188 U. S. 189, 47 L. Ed. 439, 23 S. Ct. 277. That decision has been overruled, and it is now established that the mere fact that the debtor is domiciled within the state does not give it jurisdiction to impose an inheritance or succession tax upon the transfer of the debt by a decedent who is domiciled in another state. Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 74 L. Ed. 371, 65 A.L.R. 1000, 50 S. Ct. 98; Baldwin v. Missouri, 281 U. S. 586, 74 L. Ed. 1056, 72 A.L.R. 1303, 50 S. Ct. 436. The transfer is taxable by the state of the domicile of the deceased owner. Blodgett v. Silberman, 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410. Open accounts, including credits, for cash deposited in bank, fall within this

> principle, and its application is not defeated by the mere presence of bonds or notes, or other evidences of debt, within a state other than that of the domicile of the owner. Baldwin v. Missouri, 281 U. S. 586, 74 L. Ed. 1056, 72 A.L.R. 1303, 50 S. Ct. 436, supra."

A later case decided by this Court involving this question is **First National Bank of Boston v. State of Maine,** (1932), 284 U. S. 312, 76 L. Ed. 313, which held that an inheritance tax may not be imposed by the state of incorporation upon shares of stock belonging to a non-resident stockholder. The Court, speaking through Mr. Justice Sutherland, repeats that Blackstone v. Miller (supra) was overruled by the Farmers Loan Company case (supra), and states that the case of Frick v. Pennsylvania (supra)

> "_____was one of the latest to approve that case and give countenance to the general doctrine that intangible property (unlike tangible property) might be subjected to a death transfer tax in more than one state; but this and all other instances of such approval, whether express or tacit, with the overthrow of the foundation upon which they rested, have ceased to have other than historic interest."

The opinion discusses in detail Frick v. Pennsylvania, Safe Deposit & T. Co. v. Virginia, Farmers Loan & Trust Co. v. Minnesota, Baldwin v. Missouri, and Beidler v. South Carolina Tax Commission, all hereinabove cited, traces through them the development of the modern conception that the transfer of intangible personalty, whether bonds, shares of stock, promissory notes, open accounts or other choses in action, may be taxed only by the state of the decendent's domicile, and holds that the exaction of such a tax by any other state is not within the power of such state under the Fourteenth Amendment.

The Court refers with approval to the quotation from Frick v. Pennsylvania with which this discussion is pre-

faced, and therefore inferentially holds that the principles expressed in its most recent opinions are applicable not only to inheritance taxes, but also to property taxes.

A franchise or license tax imposed by a state upon a foreign corporation for the privilege of doing business within that state, but measured in part by property owned or business done outside that state, is a deprivation of property without due process of law.

Looney v. Crane Company, (1917), 245 U. S. 178, 62 L. Ed. 230;

Alpha Portland Cement Co. v. Massachusetts, (1924), 268 U. S. 203, 69 L. Ed. 916.

An income tax imposed by a state upon a foreign corporation measured in part by income received from property owned or business done outside that state, is a deprivation of property without due process of law.

In **Hans Rees' Sons, Inc. v. State of North Carolina,** (1931), 283 U. S. 123, 75 L. Ed. 879, the Court, speaking through Mr. Chief Justice Hughes, at page 905 of 75 L. Ed. said:

> "Undoubtedly, the enterprise of a corporation which manufactures and sells its manufactured product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits. The difficulty of making an exact apportionment is apparent and hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation, the

activities which are conducted in different jurisdictions are to be regarded as "component parts of a single unit" so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state. As was said in the Bass, Ratcliff & Gretton Case with regard to "the unitary business of manufacturing and selling ale" which began with manufacturing in England and ended in sales in New York, that state "was justified in attributing to New York its proportion of the profits earned by the company from such unitary business". And the principle that was recognized in National Leather Co. v. Massachusetts, 277 U. S. 413, 72 L. Ed. 935, 48 S. Ct. 534, supra, was that a tax could lawfully be imposed upon a foreign corporation with respect to "the proportionate part of its total net income which is attributable to the business carried on within the state." When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction."

Newport Company v. Wisconsin Tax Commission, (1935), ____ Wis. ____, 261 N. W. 884.

It is apparent from these cases that the Fourteenth Amendment forbids (1) multiple taxation of intangibles and (2) taxation by a state of property outside its jurisdiction, and that the tendency of this Court is to confine to the state of the domicile power to tax intangibles.

Upon application of these principles to the case at bar, we find that the State Court's decision, directing the assess-

ment for taxation of appellant's total cash and total accounts and notes receivable, disregards the prohibition in the Fourteenth Amendment to the United States Constitution against taking property without due process of law and

1. Imposes a property tax upon the total accounts and notes receivable payable to a taxpayer domiciled in Delaware.
2. Impose a property tax upon accounts and notes receivable payable to a taxpayer domiciled in Delaware and arising from business done outside the State of West Virginia.
3. Imposes a property tax upon money owned by a taxpayer domiciled in Delaware and deposited in states other than West Virginia.
4. Imposes a property tax upon money owned by a taxpayer domiciled in Delaware and on deposit in West Virginia, the larger part of which was derived from business outside of West Virginia.
5. Imposes a property tax upon that portion of the money owned by a taxpayer domiciled in Delaware and on deposit in West Virginia which is not maintained in West Virginia for use in the owner's West Virginia business.

The fact that the State Court's opinion, (R. 66), permits the deduction of intangible property owned by the appellant and taxed in Ohio during the same tax period does not assist in any determination of the question of jurisdiction to tax.

As stated in the Agreed Statement of Facts (R. 13):
"In order to determine the amount of accounts receivable of a foreign corporation subject to taxation in Ohio, the Ohio statutes provide that current accounts payable shall be deducted from the total of current ac-

counts receivable and prepaid items, and that the result shall be apportioned in accordance with the ratio of current accounts receivable arising from business transacted within Ohio to the total current accounts receivable. Under these Ohio statutes the Wheeling Steel Corporation has been assessed as of January 1, 1933, on accounts and notes receivable amounting to $250,133.42, which amount is included in the total amount of accounts and notes receivable assessed against the Wheeling Steel Corporation by the Assessor of Ohio County and the Tax Commissioner as of January 1, 1933."

It will be noted that, in order to determine the amount of the tax, Ohio permits current accounts payable to be deducted from the total of the receivables and prepaid items. Thus, although all Ohio receivables are taxable in Ohio, only the excess of receivables and prepaid items over current payables is actually taxed. This deduction of current indebtedness accounts for the fact that intangibles amounting only to $250,133.42 were taxed in Ohio as at January 1, 1933, but the formula for determining receivables taxable in Ohio takes into consideration all the accounts receivable arising from business transacted within Ohio. All the receivables arising from business transacted within Ohio are taxable there and could be taxed in that state if Ohio should at some time prohibit the deduction of indebtedness, which is not improbable in view of the fact that West Virginia has prohibited the deduction of indebtedness (R. 52-53).

The State Court acknowledges that Ohio has power to tax a portion of the appellant's intangibles, apparently under the "business situs" theory. Suppose Ohio did not choose to exercise that power. Would West Virginia, because of Ohio's failure to exercise an acknowledged power, acquire jurisdiction to tax intangibles derived from Ohio

business? West Virginia's attempt to tax property over which it does not have jurisdiction is contrary to the Fourteenth Amendment.

It is evident from the cases above cited that no state other than the domicile of the owner may tax intangible personal property which has not acquired a business situs within its borders. That the Court failed to apply the business situs doctrine to the facts in **Baldwin v. Missouri,** supra, may mean that the doctrine is no longer considered law by this Court.

It is also evident that no state may measure the franchise, license or income tax imposed by it upon a foreign corporation by property owned and business done outside the state, or income from such property and business. If the property owned and business done outside the state may not be used as a measuring stick, **a fortiori** the property itself may not be taxed.

C. Said Sections do not afford a statutory basis for taxation under the "business situs" theory.

The more important so-called "business situs" cases were decided by this Court during the period of time from 1899 to 1911, and are:

New Orleans v. Stempel, (1899), 175 U. S. 309, 44 L. Ed. 174;

Bristol v. Washington County, (1900), 177 U. S. 133, 44 L. Ed. 701;

State Assessors v. Comptoir National D'Escompte, (1903), 191 U. S. 388, 48 L. Ed. 232;

Metropolitan Life Ins. Co. v. New Orleans, (1907). 205 U. S. 395, 51 L. Ed. 853;

Liverpool & L. & G. Ins. Co. v. Board of Assessors, (1911), 221 U. S. 246, 55 L. Ed. 762.

In **New Orleans v. Stempel,** and in **State Assessors v. Comptoir National D'Escompte,** the decisions rested upon the physical presence of the notes, etc., within the taxing jurisdiction. The latter case cites **Blackstone v. Miller** as an authority. We need give no further attention to these cases in view of Mr. Justice Sutherland's general condemnation of **Blackstone v. Miller** and its doctrine in the discussion of **First National Bank of Boston v. State of Maine,** supra.

In Bristol v. Washington County the taxpayer was domiciled in New York, but carried on a business of loaning money in Minnesota through an agent. The notes, apparently executed by Minnesota debtors since they were secured by mortgages on Minnesota property, were not kept in that State, but were kept in New York, except when their presence was necessary in Minnesota for the purpose of renewal, foreclosure, etc. The Court held that the absence of the notes from the taxing jurisdiction was immaterial.

In **Metropolitan Life Insurance Company v. New Orleans** a non-resident insurance company made loans to its Louisiana policy holders. The notes were kept in New York, and the Court, citing **Bristol v. Washington County** and **Blackstone v. Miller,** held the Louisiana tax proper.

Liverpool & L. & G. Ins. Co. v. Board of Assessors did not involve notes or specialties. The property permitted to be taxed by Louisiana was the amount due to the insurance company from its policy holders in Louisiana for premiums on which credit of thirty and sixty days had been extended. Counsel for the insurance company attempted to make a distinction between notes and credits not evidenced by a writing, but this Court, through the

present Chief Justice, at page 354 of the U. S. Reporter, said:

> "The asserted distinction cannot be maintained. When it is said that intangible property, such as credits on open account, have their situs at the creditor's domicil, the metaphor does not aid. Being incorporeal, they can have no actual situs. But they constitute the property; as such they must be regarded as taxable, and the question is one of jurisdiction.
>
> "The legal fiction expressed in the maxim **mobilia sequuntur personam** yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicil. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor, and is of value to the creditor, because he may be compelled to pay; and power over the debtor at his domicil is control of the ordinary means of enforcement. Blackstone v. Miller, 188 U. S. pp. 205, 206, 47 L. Ed. 444, 445, 23 Sup. Ct. Rep. 277. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the state, and there the rights of the creditors were to be enforced. If locality, in the sense of subjection to sovereign power could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there."

Twice in this quotation the Chief Justice emphasizes that the taxing state is the domicile of the debtors. Later, in the same opinion, he states:

> "But, as we have seen, the jurisdiction of the state of his domicil, over the creditor's person, does not exclude the power of another state in which he transacts his business, to lay a tax upon the credits there accruing to him against resident debtors, and thus to enforce contribution for the support of the government under whose protection his affairs are conducted."

The opinion is undoubtedly confined to a tax upon amounts due from resident debtors arising from business conducted within the state. In no case found by counsel for appellant has this Court extended the doctrine of "business situs" further.

The decision of the State Court in the instant case, (R. 62-66), is not confined within the limits set by this Court in the case of **Liverpool & L. & G. Ins. Co. v. Board of Assessors, supra,** for it imposes a property tax upon accounts and notes receivable payable to a taxpayer domiciled in Delaware and arising from shipments of products manufactured in and shipped from plants located in West Virginia to customers who are non-residents of West Virginia.

It was upon consideration of **Liverpool & L. & G. Ins. Co. v. Board of Assessors,** in connection with the recent United States Supreme Court cases above discussed, that led the appellant to report for taxation in West Virginia (1) that portion of its total deposits necessarily maintained in banks located in West Virginia for use in its West Virginia business and (2) only those accounts and notes receivable which were owed to it by residents of West Virginia.

It is doubtful that the "business situs" theory of taxa-

tion, even if it would now be upheld by this Court, is applicable under West Virginia statutes. Baldwin v. Missouri supra.

It should be remembered that in the "business situs" cases the Court was applying a particular statute, and that unless a similar statute is involved, it cannot be properly be said that those cases are applicable. The Louisiana statutes involved in the "business situs" cases above cited contain the following or similar provisions: (The statute is quoted from **New Orleans v. Stempel).**

> "And this shall apply with equal force to any person or persons representing in this state business interests that may claim a domicil elsewhere, the intent and purpose being that no non-resident, either by himself or through any agent, shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations, or credits arising from the business done in this state are hereby declared assessable within this state, and at the business domicil of said non-resident, his agent, or representative."

The above quoted Louisiana statute expressly provides that receivables arising from business done in that state shall be assessed for taxation there. The West Virginia statutes, however, contain no provision for allocation to that State of intangible property which is within its jurisdiction, as distinguished from such property over which it has no jurisdiction.

Upon analyzing the statutes, we find that Chapter 11, Article 3, Section 12 (Michie 1933 Supplement, Section 681) provides that "Each incorporated company foreign or domestic having its principal office or chief place of business in this State, or owning property subject to taxation in

this state," shall make a written report showing the following items:

> "(a) the amount of capital authorized to be employed by it;
>
> "(b) the amount of cash capital paid on each share of stock;
>
> "(c) the amount of money on hand or on deposit anywhere subject to its check or draft, on the first day of the assessment year;
>
> "(d) the amount of credits and investments other than its own capital stock held by it on said date, with their true and actual value;
>
> "(e) the quantity, location and true and actual value of all of its real estate, and the magisterial district or districts in which it is located;
>
> "(f) the kinds, quantity and true and actual value of all its tangible property in each magisterial district in which it is located."

Thus the appellant, a Delaware corporation owning real and tangible personal property subject to taxation in West Virginia, and also owning similar property subject to taxation in other states, is required to report, under items (c) and (d) above, its total money on hand or on deposit subject to its check, and its total credits and investments. Said Section 12 makes no provision for reporting only that portion of the money and credits which may be subject to taxation in West Virginia.

Chapter 11, Article 3, Section 13 (Michie 1932 Code, Section 682) assumes to provide rules for the assessor to follow in listing for taxation the property reported under the provisions of the foregoing Section 12. It provides that if the assessor is satisfied with the correctness of the report,

that is, if he believes that the reporting corporation has reported all its property, whether such property is taxable in West Virginia or not, he "shall assess the value of all the property of such corporation liable to taxation." Said Section 13 also provides that "the property mentioned in items (c), (d), (e) and (f) shall constitute all the property on which such corporation shall be liable to pay taxes."

Does this Section 13 mean that all property reported shall be assessed for taxation, or that the assessor shall determine in his own mind what portion of the property reported shall be assessed?

If it means that all property reported under the requirements of Section 12 shall be assessed for taxation, it is clearly unconstitutional in its application to the appellant, for, as appears in other portions of this Brief, all of the money and credits owned by the appellant is not taxable in West Virginia. If it means that the assessor shall himself devise ways and means for determining how the total property reported shall be divided into property taxable in West Virginia and property which is not taxable in West Virginia, it is likewise unconstitutional, for that is a legislative, not an administrative function. If it be argued that the assessor may, without specific direction by the Legislature, divide such property into taxable and non-taxable items subject to review by the courts, the statute is unconstitutional, for assessment is not a judicial function.

Article V, Section 1, of the West Virginia Constitution reads as follows:

Division of Powers

"1. The Legislative, Executive and Judicial Departments shall be separate and distinct, so that nei-

ther shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature."

Consideration of Chapter 11, Article 5, Section 1 (Michie 1933 Supplement, Section 716) is of no material assistance in this connection. Said Section 1 provides that "all personal property in the State, though owned by persons residing out of the State, shall be entered in the personal property book and be subject to equal and uniform taxation", but there is no provision in Chapter 11, Article 3, Section 12, or in any other Section of the Code found by counsel, pertaining to the taxation of property owned by ordinary business corporations, providing that a foreign corporation shall report to the assessor only that portion of its intangible personal property which is in the State, or providing any method for determining what part of its intangible property is "in the State." Such a corporation is required to report all its intangible personalty, wherever located or used and howsoever acquired.

How, then, is the assessor to determine what portion, if any, of the total personal property owned by a foreign corporation and reported by it in accordance with the provisions of Chapter 11, Article 3, Section 12, is liable to taxation in West Virginia? The above mentioned Chapter 11, Article 3, Section 12 prescribes the only form of report required.

It is axiomatic that administrative officers charged with the assessment of taxes must make their assessments in the manner prescribed by law. If the Legislature has not prescribed a clear and specific manner in which taxes shall be assessed, neither the administrative officers nor the

courts may supply the defect. Statutes imposing taxes are to be construed most strongly against the government and in favor of the taxpayer.

Commonwealth v. P. Lorillard Co., Inc., (1921), 129 Va. 74, 105 S. E. 683;

County of Sussex v. Jarratt, (1921), 129 Va. 672, 106 S. E. 384, 627;

Commonwealth v. Wilson, (1925), 141 Va. 116, 126 S. E. 220;

Southern Express Company v. Patterson, (1909), 122 Tenn. 279, 123 S. W. 353;

State v. Humble Pipe Line Co., (1923), 112 Tex. 375, 247 S. W. 1082.

In **Commonwealth v. P. Lorillard Co., Inc., supra**, the Virginia statute, under which an income tax was assessed against the Lorillard Company, read as follows:

> "The classification under Schedule D providing for the taxation of income shall be as follows, to wit: The aggregate amount of income of each person or corporation, whether received or due but not received within the year next preceding this first of January in each year, subject to the deduction and exemptions herein below recited."

The Lorillard Company was a New Jersey corporation doing business in various states, including Virginia. The facts of the case, the statute involved, and the decision of the Court are well summarized in the following quotation from the opinion: (page 686 of 105 S. E.)

> "In the case at bar it does not appear how much of the income was derived from business done in Virginia, nor does the statute of 1916 provide any method by which that fact could be ascertained, but the

administrative officers saw that they could not enforce the provisions of the statute as to income derived from business done outside of the state, and, the statute being silent on the subject, they undertook to devise a scheme of their own by which to determine how much of the total income of the defendant in error was derived from business done in this state. The statute conferred no such authority upon them, and they had no such power. The Legislature alone could exercise this power, and, having failed to do so, no such apportionment can be made, and the trial court was right in holding that there was no law in this state under which the income tax sought to be assessed could be collected on so much of the income as was derived solely from business done in this state."

In **Southern Express Company v. Patterson, supra,** the complainant, a Georgia corporation doing business in Tennessee and other states, sued to enjoin Hamilton County, Tennessee, tax officials from attempting to impose a tax upon intangibles. It appeared in the facts that the complainant's entire general auditing and accounting was done in said Hamilton County, Tennessee.

The Tennessee court granted the injunction, and in the course of its opinion, (page 357 of 123 S. W.) said:

"The first section of Chapter 258, p. 632, Acts 1903, under which the proceeding before T. E. Patterson was instituted, enacts that all property real, personal and mixed, shall be assessed for taxation for state, county and municipal purposes, except such as is declared exempt in the next section."

"This includes the intangible property of all corporations, and subjects it to taxation; but this is not sufficient. The requirement that the Legislature provide a mode for the ascertainment of the value of property—the assessment of it—so that it may be

assessed according to its value, and that the taxes collected from it be equal and uniform with those assessed upon other property of the same value, is equally mandatory, and before any property can be valued and assessed for taxation a proper method and machinery for such valuation and assessment must be provided."

The Court, upon analyzing another statute put forth as a justification for the assessment, said (p. 358):

> "It is obvious that the clauses providing that all property of corporations of every kind and description, tangible and intangible, shall be valued and assessed, necessarily exclude corporations doing business in and operating in other states, because the tangible and intangible property belonging to them in such other states is beyond the jurisdiction of the state of Tennessee, and cannot be taxed by it."

In reference to another statute, the Court said (p. 358):

> "This paragraph is the only one which relates to the assessment of the intangible assets of foreign corporations doing business in this and other states, and it contains no provision fixing the situs of the intangible assets of such corporations, or a method for ascertaining their value and assessing them for taxation, and thus fails to accomplish its purpose."

At page 359 of 123 S. W., the Tennessee Court summarized its reasoning and decision as follows:

> "The Legislature having failed to fix the situs of the intangible property of foreign corporations growing out of business done and property owned by them in more than one county in this state, it is to be found in all of the counties where this property and business is located and carried on. The Trustee of Hamilton County would have no authority to assess the entire value of the intangible property of the com-

> plainant in that county, if a method for ascertaining and assessing its value was provided by the statute; but the portion in each and every county would be there assessable. But, in the absence of a method provided for ascertaining its value, it cannot be assessed anywhere. The remedy is not in the courts, but with the Legislature."

In **State v. Humble Pipe Line Co., supra,** the court, at page 1085 of 247 S. W., quoted from **W. U. Tel. Co. v. Texas,** 62 Texas, 630, as follows:

> "It is of the utmost importance, for the protection of the taxpayer, that laws should be certain, both as to the thing taxed and as to the amount of the tax, and the manner for its ascertainment; that the taxpayer may have an opportunity, without the expense of litigation, to pay such taxes as he may owe; and a tax law which does not accomplish this purpose ought to be held invalid, whether this results from an attempted exercise of power not possessed, through which the law becomes uncertain by both proper and improper subjects being combined and selected for taxation, or by the failure of the legislature for any other reason to furnish the rules by which taxes may be levied, assessed and collected."

This Court has recently had occasion to consider the effect of delegation of legislative power in two cases:

> **Panama Refining Company v. Ryan,** (1935), 293 U. S. 388, 79 L. Ed. 446;
>
> **Schlecter Poultry Corporation v. United States,** (1935), 295 U. S. 495, 79 L. Ed. 1570.

In these cases this Court held sections of the National Industrial Recovery Act invalid for the reason that Congress had delegated to the President its legislative power, without establishing the standard of legal obligation.

It is therefore respectfully submitted that the statutes of West Virginia do not contain any method for ascertaining and assessing the intangible personal property of a foreign corporation doing business in this and other states, and that, under the above decisions, no taxes may be levied upon the appellant by reason of its ownership of such property, whether the situs of such property be determined to be in West Virginia or elsewhere.

The parties have agreed and the Circuit Court of Ohio County, in its first judgment order (R. 14-16) found that only $496,095.33 out of a total of $4,491,323.67 of intangible personalty owned by appellant on January 1, 1933, represented proceeds of and/or were derived from sales of goods manufactured in and shipped from West Virginia plants to residents and non-residents of West Virginia. That amount is the largest possible amount which could lawfully be taxed under a proper statute. We have demonstrated above that no such statute exists and that, in the absence of such a statute, none of appellant's intangible personalty is taxable in and by West Virginia, even under the "business situs" theory.

II. Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, as construed by the State Courts, are in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, for

A. Said Sections, when read in connection with Section 15, Article 3, Chapter 11 of the Code, which limits the assessment for taxation of similar property owned by an individual or unincorporated firm to money derived from or belonging to and credits arising out of business done by such individual or unincorporated firm within the State

of West Virginia, operate to deny to this appellant the equal protection of the laws.

We have demonstrated above under Point I that neither Section 12 nor Section 13 of Article 3, Chapter 11 establishes criteria upon which the assessor shall decide what part, if any, of the total intangibles reported shall be assessed for taxation. The State Court, however, took the position that, since all such property must be reported, the legislature intended that all of it, except that portion taxed in other States, should be taxed in West Virginia. If that is the proper interpretation these sections discriminate unlawfully against business corporations and in favor of natural persons.

Chapter 11, Article 3, Section 13 Michie 1933 supplement, Section 684) reads in part as follows:

> "ASSESSMENT OF CAPITAL USED IN TRADE OR BUSINESS BY NATURAL PERSONS. — The value of the capital used by any individual or firm not incorporated, in any trade or business taxable by law, shall be ascertained in the following manner: The owner, agent, or chief accountant of every such trade or business____carried on in any county of the State, shall, annually____make a written report as of the first day of the assessment year to the assessor____ showing the following matters and things, viz:____(c) the amount of all money derived from or belonging to such trade or business, on hand or remaining uninvested on that day, whether in or out of the State, payable to such individual or firm; (d) the amount in value of all credits arising out of any such business and remaining unpaid on that date, whether due or not, and whether in or out of the State; (e) the amount and true and actual value of all money, notes, bonds, bills, accounts receivable, stocks and other intangible property made by such person or firm whether in or

> out of the State, other than those hereinbefore specified;____the personal property mentioned in such report he shall enter in the personal property book of his county for assessment with taxes____"

The above quoted Section 15 assumes to tax only the amount of money derived from or belonging to and the amount in value of all credits arising out of business transacted by a natural person within the State.

The State Constitution, Section 1, Article 10, provides that:

> "_____ taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value_____"

The tax here in dispute is a property tax. We do not have for consideration a privilege, license or income tax. Granted that a state might make a reasonable distinction between the privilege exercised by a corporation and that of an individual or firm, we are not here concerned with any such question. It is a fundamental principle of taxation that a direct property tax must be uniform, irrespective of ownership. It must apply uniformly to all property regardless of its ownership and a state may not discriminate against property owned by corporations in favor of property owned by individuals and firms.

To give an example of the practical workings of these two sections, we respectfully suggest the following situation: An Ohio resident living across the Ohio River from Wheeling, West Virginia, is engaged in business both in

West Virginia and Ohio with his principal office in Wheeling. He manufactures in Ohio and West Virginia and sells goods to residents and non-residents of West Virginia. Such an individual would not pay in West Virginia, under said Section 15, a tax upon the money which he may have deposited in banks in Pittsburgh, Pennsylvania, derived from goods manufactured and sold in Ohio, nor would he pay a tax in West Virginia under said Section on the credits arising out of his Ohio business, even though said business was directed from his office in Wheeling. Such intangible property is of the same character as that upon which appellant is taxable. The fact that appellant is a corporation cannot justify this discrimination in the statutes relating to taxation of property. The use of the property is the same. This distinction between property of corporations on the one hand and that of individuals and firms on the other is not based upon anything having any relation to the purpose for which it was made. Appellant has been denied the right, guaranteed to it by the State Constitution, to have its property taxed uniformly with that of individuals and unincorporated firms, and has been denied the equal protection guaranteed to it by the Federal Constitution. Corporations are persons within the meaning of the Fourteenth Amendment.

Smyth v. Ames, (1898), 169 U. S. 466, 42 L. Ed. 819;

Southern Railway Co. v. Greene, (1910), 216 U. S. 400, 54 L. Ed. 536.

Classification must be based upon some reasonable foundation.

F. S. Royster Guano Co. v. Virginia, (1920), 253 U. S. 412, 64 L. Ed. 989.

Unreasonable classification results in unlawful discrimination.

Quaker City Cab Co. v. Pennsylvania, (1928), 277 U. S. 389, 72 L. Ed. 927;

Louisville Gas & Electric Co. v. Coleman, (1928), 277 U. S. 32, 72 L. Ed. 770;

Hans Rees' Sons, Inc. v. State of North Carolina, (1931), 283 U. S. 123, 75 L. Ed. 879.

This case comes directly within the decision in **Quaker City Cab Co. v. Pennsylvania, supra.** In fact the invalidity of the statute here is more apparent. The Pennsylvania statute provided for a tax upon "gross receipts" of incorporated carries and did not impose a like tax upon similar businesses of individuals. In the instant case the tax is a direct property tax, and the clear discrimination in the statutes against property owned by corporations and in favor of property owned by individuals and unincorporated firms cannot be justified upon any theory. Nor can the assessment here made be justified upon the theories set forth in the dissenting opinion of Mr. Justice Brandeis in the Quaker City Cab case. While a tax upon gross receipts or a tax upon the privilege of doing business may at times be subject to reasonable classification, the question of classification cannot and does not here arise.

We respectfully submit that a statute classifying property according to ownership, and subjecting the property of a corporate owner to taxation while exempting similar property owned by an individual or firm, creates a discrimination violative of the equal protection clause of the Fourteenth Amendment. Under the two sections of the state law a corporation with exactly the same amount of money and credits and doing exactly the same amount and kind of business as an individual or unincorporated firm would be taxed upon all of such money and credits, while the individual or firm would not be taxed upon money and

credits derived from business transacted outside the state.

B. Said Sections, when read in connection with Sections, 2, 4, 5, 6 and 7, Article 6, Chapter 11 of the Code, which limit the assessment for taxation of similar property owned by persons, firms or corporations operating as public utilities to property "wholly held or used in this State", operate to deny this appellant the equal protection of the laws.

A further instance of inequality suffered by the appellant under the rule of the State Courts is demonstrated by a comparison of the provisions of Sections 12 and 13 of Article 3, Chapter 11 of the Code, relating to business corporations, with the provisions of Section 2, Article 6, Chapter 11 relating to the assessment of similar property owned by railroads. Said Section 2 provides that the operator of a railroad, whether individual, unincorporated firm, domestic or foreign corporation, shall show in its annual return to the Board of Public Works "(f) personal property, of every kind whatsoever, including money, credits and investments wholly held or used in this State, showing the amount and value thereof in each county." This return is made by each railroad doing business in West Virginia, irrespective of the location of its principal or general office and irrespective of the place where the control of its activities is exercised. Railroads as a general rule do business in more than one state. Appellant is likewise doing business in several states. At least 75% of the bank deposits and credits owned by it on January 1, 1933, the date of the assessment herein complained of, had arisen or had been derived from business done by it in states other than West Virginia (R. 7). Is there any reason for taxing the intangibles of a manufacturing corporation derived from business done in states other than West Virginia while per-

mitting similar property of a railroad company to go untaxed? Under the State Constitution classification of property according to ownership cannot be made. Classification, even when permitted, cannot be made arbitrarily. It must be founded upon a substantial, reasonable and just basis. Discrimination according to ownership of property does not afford such a basis.

> "The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation."
>
> **Quaker City Cab Co. v. Pennsylvania, supra**

The money, credits and investments of car lines, pipe lines, express companies and telephone and telegraph companies, whether operated by individuals, unincorporated firms or domestic or foreign corporations, are assessed for taxation in the same manner as railroads and afford a like comparison. Sections 4, 5, 6 and 7 of Article 6, Chapter 11 of the Code have not been printed in full in this brief, but the provisions with respect to the assessment of the money, credits and investments to be reported by such companies are the same as those applicable to railroads, and only such money, credits and investments as are, in the words of said Sections, "wholly held or used in this State", are subject to

taxation. The State Courts are prevented by law from applying to such companies the rule they have held applicable to this appellant. This difference in the statutes results in a discrimination against ordinary business corporations and in favor of public utilities. A railroad or telephone company, doing business in West Virginia and Ohio, having its principal or general office in West Virginia, is taxed only upon those of its intangibles which are wholly held or used in its West Virginia business. Under the State Court's decision, however, the appellant, a manufacturer, is taxed upon all its intangible property, without reference to the derivation or use of such property. Money, credits and investments, whether owned by a manufacturing corporation or by a public utility, are of the same general nature and must, under the Constitution of West Virginia and the Fourteenth Amendment of the United States Constitution, be similarly treated. There is no justification in the law for the discrimination present in this case.

We submit, therefore, that Sections 12 and 13, Article 3, Chapter 11 of the Code, as interpreted by the State Courts, when read in connection with the Sections of the Code pertaining to the assessment of property owned by public utilities, clearly discriminate against the appellant and in favor of individuals, unincorporated firms, domestic and foreign corporations operating railroads, car and pipe lines, express companies and telephone and telegraph companies.

Quaker City Cab Co. v. Pennsylvania, supra;
Louisville Gas & Electric Co. v. Coleman, supra;
Hans Rees' Sons, Inc. v. State of North Carolina, supra.

It is respectfully submitted that the judgment of the Circuit Court of Ohio County should be reversed.

Wheeling, W. Va.
February 17, 1936

WRIGHT HUGUS,
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Article X, Section 1, of the Constitution of West Virginia reads as follows:

"Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants one dollar; and upon all other property situated outside of municipalities one dollar and fifty cents; and upon all other such property situated within municipalities, two dollars; and the legislature shall further provide by general law, for increasing the maximum rates, authorized to be fixed, by the different levying bodies upon all classes of property, by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty per cent of the qualified voters shall favor such increase, and such increase shall not continue for a longer period than three years at any one time, and shall never exceed by more than fifty per cent the maximum rate herein provided and prescribed by law; and the revenue derived from this source shall be apportioned by the legislature among the levying units of the State in proportion to the levy laid in said units upon real and other personal property; but property used for

educational, literary, scientific, religious or charitable purposes, all cemeteries, public property, the personal property, including live stock, employed exclusively in agriculture as above defined and the products of agriculture as so defined while owned by the producers may by law be exempted from taxation; household goods to the value of two hundred dollars shall be exempted from taxation. The legislature shall have authority to tax privileges, franchises, and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation, incomes below a minimum to be fixed from time to time, and such revenues as may be derived from such tax may be appropriated as the legislature may provide. After the year nineteen hundred thirty-three, the rate of the state tax upon property shall not exceed one cent upon the hundred dollars valuation, except to pay the principal and interest of bonded indebtedness of the State now existing. (House Joint Resolution No. 3, Acts 1932 Ex. Sess., c. 9, p. 72; 1932, Ex. Sess., c. 10. Ratified in November, 1932)."

Section 12, Article 3, Chapter 11 of the Code, as amended by Chapter 38 of the Acts of Legislature, 1933, Extraordinary Session, read as follows:

"(12) ASSESSMENT OF CORPORATE PROPERTY; REPORTS TO ASSESSOR BY CORPORATIONS. — Each incorporated company foreign or domestic having its principal office or chief place of business in this State, or owning property subject to taxation in this State, except railroad, telegraph and express companies, telephone companies, pipe line, car line companies and other public utility companies. banking institutions, national banking associations and industrial loan companies, shall annually, between the first day of the assessment year and the first day of May, make a written report, verified by the oath of the president or chief accounting officer,

to the assessor of the county in which its principal office or chief place of business is situated, showing the following items, viz: (a) The amount of capital authorized to be employed by it; (b) the amount of cash capital paid on each share of stock; (c) the amount of money on hand or on deposit anywhere subject to its check or draft, on the first day of the assessment year; (d) the amount of credits and investments other than its own capital stock held by it on said date, with their true and actual value; (e) the quantity, location and true and actual value of all of its real estate, and the magisterial district or districts in which it is located; (f) the kinds, quantity and true and actual value of all its tangible propetry in each magisterial district in which it is located.

"The oath required for this section shall be substantially as follows, viz;

STATE OF WEST VIRGINIA,

County of----------, ss:

I,---------- ----------, president (treasurer or manager) of (here insert name of corporation), do solemnly swear (or affirm) that the foregoing is, to the best of my knowledge and judgment, true in all respects; that it contains a statement of all the real estate and personal property, including moneys, credits and investments belonging to said corporation; that the value affixed to such property is, in my opinion, its true and actual value, by which I mean the price at which it would sell if voluntarily offered for sale on such terms as are usually employed in selling such property, and not the price which might be realized at a forced or auction sale; and said corporation has not, to my knowledge, during the sixty-day period immediately prior to the first day of the assessment year converted any of its assets into nontaxable securities or notes or other evidence of in-

debtedness for the purpose of evading the assessment of taxes thereon; so help me, God.

"The officer administering such oath shall append thereto the following certificate, viz:

"Subscribed and sworn to before me by_____ _____, this the _____ day of _____, 19____.

_____."

Section 13, Article 3, Chapter 11, as it appears in the Official Code of 1931, reads as follows:

"(13) ENTRY OF CORPORATE PROPERTY BY ASSESSOR. —Upon receiving the verified report required by the preceding section, the assessor, if satisfied with the correctness thereof, shall assess the value of all the property of such corporation liable to taxation, and enter the same as follows, viz: All property in item (e) shall be entered with its valuation in the land books of the county, and in the magisterial district in which the real estate is situated; all property mentioned in items (c) and (d) shall, together with their valuation, be entered in the personal property book of the county, and in the magisterial district wherein is the principal office or chief place of business of such corporation, under the appropriate heads; and all property mentioned in item (f) shall, together with its valuation, be entered in the personal property book of the county, and in the magisterial district wherein such property is on the first day of the assessment year; the property mentioned in items (c), (d), (e) and (f) shall constitute all the property on which any such corporation shall be liable to pay taxes. If a company have branches, each branch shall be assessed separately in the county and magisterial district where its principal office for transacting its financial concerns is located; or, if there be no such office, then in the magisterial district where its operations are carried on. All locks and dams of navigation

companies shall be assessed and taxed as real estate in the county and magisterial district wherein they are situated; and in case such locks and dams are located on any creek or river which is the dividing line between counties, or the dividing line between magisterial districts of the same county, one-half of the value thereof shall be assessed in each of such counties or magisterial districts, as the case may be; when the property of an incorporated company is assessed as aforesaid, no individual shareholder therein shall be required to list or be assessed with his share, portion or interest in the capital stock of such corporation."

Section 15, Article 3, Chapter 11 of the Code, as amended by Chapter 40 of the Acts of the Legislature, 1933, reads as follows:

"(15) ASSESSMENT OF CAPITAL USED IN TRADE OR BUSINESS BY NATURAL PERSONS. — The value of the capital used by any individual or firm not incorporated, in any trade or business taxable by law, shall be ascertained in the following manner: The owner, agent, or chief accountant of every such trade or business, except the business of agriculture, carried on in any county of the State, shall, annually, between the first day of the assessment year and the first day of May of the current year, make a written report as of the first day of the assessment year, to the assessor, verified by his affidavit, showing the following matters and things, viz: (a) the amount, the true and actual value and classification of all tangible personal property used in connection with such trade or business, otherwise than such as is regularly kept for sale therein, including chattels real: (b) the true and actual value and classification of all goods and property kept for sale and remaining unsold; (c) the amount of all money derived from or belonging to such trade or business, on hand or remaining uninvested on that day, whether in or out of the State, payable to such individual or

firm; (d) the amount in value of all credits arising out of any such business and remaining unpaid on that date, whether due or not, and whether in or out of the State; (e) the amount and true and actual value of all money, notes, bonds, bills, accounts receivable, stocks and other intangible property made by such person or firm whether in or out of the State, other than those hereinbefore specified; (f) the location, quantity, the true and actual value and classification of all real estate owned by such individuals or firm and used in such trade or business. The assessor shall, upon the receipt of such report, properly verified, if he is satisfied with the correctness thereof, enter the real estate in the landbook of the county in the district wherein the same is situated, and assess the same with taxes, if not otherwise assessed, to the owner thereof; the personal property mentioned in such report he shall enter in the personal property book of his county for assessment with taxes as follows, viz: Items (a) and (b) shall be entered in the magisterial districts where they are for the greater part of the year kept or located; and items (c) and (d), (e) and (g) shall be entered under their appropriate headings, in the municipality or magisterial district wherein the principal place of business of such individual or firm is; if the assessor is not satisfied with the correctness of such report he may proceed to ascertain a correct list of the property on which such individual or firm is liable to be assessed with taxes, and to value the same as in other cases; the person making such report shall take and subscribe an oath in substantially the following form:

I, _____, do solemnly swear (or affirm) that the foregoing list is true and correct to the best of my knowledge, that the value affixed to the property therein listed I believe to be the true and actual value thereof; that none of the assets belonging to (here state the name of individual or firm) and used in the business of (here describe the business)

have to my knowledge, since the first day of the assessment year, been converted into nontaxable securities for the purpose of evading the assessment of taxes thereon; so help me, God.

"The officer administering said oath shall append thereto the following certificate, viz:

"Subscribed and sworn to before me by (here insert affiant's name) this_____day _____, 19____.

---."

Section 1, Article 5, Chapter 11 of the Code, as amended by Chapter 40 of the Acts of the Legislature, 1933, reads as follows:

"(1) WHAT PERSONAL PROPERTY TAXABLE. — All personal property belonging to persons residing in this State, whether such property be in or out of the State, and all personal property in the State, though owned by persons residing out of the State, shall be entered in the personal property book, and be subject to equal and uniform taxation, except as classified in section four, article eight of this chapter, unless especially exempted by law; but personal property of all classes, except as hereinbefore provided, belonging to the residents of this State, which is actually and permanently located in another state, and by the laws of such other state is subject to taxation and is actually taxed in such other state, shall not be entered on the personal property book, or be taxed in this State. But the shares of capital stock owned by residents of this State in corporations actually located in other states, and whose property is taxed by the laws of such other state, shall not be required to be listed for taxation. All moneys belonging to citizens of this State, and loaned to any person or deposited out of the State, shall be subject to taxation the same

as if loaned or deposited in this State. Any person who at any time before the assessment year transfers by loan, deposit or gift, any money, notes, bonds, bills and accounts receivable, stocks and other intangible personal property, which are subject to taxation to anyone, who does not return a list of taxation as of the day on which the assessment year commences including such property, transfers, loans, deposits or gifts, if made with the intention of evading taxation, shall be deemed and treated as illegal and fraudulent and the assessor shall assess such property for taxation to the party who makes such transfers, loans, deposits or gifts as aforesaid."

Chapter 11, Article 12, Section 71 of the Official Code of West Virginia of 1931 (Michie 1932 Code, Section 939), reads as follows:

"(71) LICENSE TAX ON FOREIGN CORPORATIONS. — Every foreign corporation holding property or doing business in this State shall make report to the auditor annually in the third month preceding the beginning of the license tax year, in which report shall be set out: (a) The name of such corporation, the name of the state or country by which incorporated, the date of the incorporation, the date of the certificate of the secretary of state authorizing it to do business in this State, the place of its principal office, the name and post-office addresses of its president, secretary, and of its officers, if any, charged with the duty of making returns of its property for taxation and the name and post-office address of its attorney of record in this State; (b) the number of shares of its authorized capital stock having a par value and the par value of each share, and the number of its issued and outstanding shares and the par value of each share; (c) the number of shares of its authorized capital stock having no par value, the number of shares of such stock authorized to be issued and the consideration fixed for

the issue of each share of the same by its charter or board of directors, and the number of shares thereof issued and outstanding; (d) the value of the property owned and used by such corporation within this State, where situate, of what it consists, and the number of acres of land it holds in this State, and the value of its property owned and used without this State; and (e) the proportion of its capital stock which is represented by property owned and used in the State of West Virginia. Such report shall be verified by the affidavit of the president, secretary or other executive officers of such corporation.

"It shall be the duty of the auditor to assess and fix the license tax of such corporation according to the proportion of its issued and outstanding capital stock which is represented by its property owned and used in this State, which license tax shall be at the rate prescribed in section sixty-nine of this article, plus fifty per cent of such tax: Provided, That no such corporation shall pay an annual license tax of less than one hundred and fifty dollars, which shall be in addition to the fee of the auditor as statutory attorney in fact. The auditor may in any case require such additional information as he may deem necessary to enable him to assess and fix the just amount of license tax of such corporation; and it shall be his duty to notify every such corporation of the amount so assessed by him; and it shall be the duty of the corporation to pay the same to the auditor of the State within thirty days thereafter, and if it fail to do so it shall be liable to the penalties prescribed in sections seventy-seven and seventy-eight of this article."

Chapter 31, Article 1, Section 79 of the Official Code of West Virginia of 1931 (Michie Code, Section 3091, reads as follows:

"FOREIGN CORPORATIONS; CONDITIONS FOR DOING BUSINESS IN THIS STATE. — Any corporation duly incorporated by the laws of any other state or territory of the United States, the

District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this State, upon complying with the provisions of this section and not otherwise. Such corporations so complying shall have the rights, powers and privileges, and be subject to the same regulations, restrictions and liabilities conferred and imposed on corporations chartered under the laws of this State. Every such corporation shall file with the secretary of state a copy of its articles of association or certificate of incorporation. The secretary of state shall thereupon issue to such corporation a certificate of the fact of its having done so, which certificate, together with a copy of its articles of association or certificate of incorporation, shall be recorded in the office of the clerk of the county court of the county, or one of the counties, in which its business is to be conducted. Every railroad corporation now or hereafter engaged in business in this State under the provisions of this section, or under a charter granted by laws passed by the State of Virginia before the formation of this State, or of this State, is hereby declared to be, as to its works, property, operations, acts and business in this State, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to corporations, except as to the right to sue in, or remove actions into, the courts of the United States, but such corporation shall not be required to file a copy of its charter or any writing with the secretary of state as provided in this section. No corporation chartered under the laws of any other state or jurisdiction shall hold any property or transact any business or bring or maintain any action, suit or proceeding in this State without having complied with the requirements hereinbefore stated, and, in addition thereto, having filed in the office of the secretary of state a writing duly executed under its corporate seal,

accepting the provisions of this section and agreeing to be governed thereby and by the laws of this State with respect to corporations chartered under the laws of this State for similar purposes; and its failure so to do may be pleaded in abatement of any action, suit or proceeding instituted by it; but nothing herein contained shall be construed to lessen the liability of any corporation which may not have complied with the requirements of this section upon any contract or for any wrong. No such corporation shall hold any property or transact any business, or bring or maintain any action, suit or proceeding in this State, where the cause of action arises out of the holding of property or doing business therein, without first complying with the provisions hereof. Every corporation which shall hold property or do business in this State without having complied with the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars for each month its failure so to comply shall continue, and prosecutions hereunder shall be in the county in which the seat of government is."

Chapter 11, Article 6, Section 2 of the Official Code of West Virginia 1931 (Michie 1932 Code, Section 728), reads as follows:

"RAILROADS.—In the case of a railroad, such return shall show for every such owner or operator: (a) The whole number of miles of railroad owned, leased or operated within this State; (b) if such railroad be partly within and partly without this State, the whole number of miles within this State, and the whole number of miles without the same, including its branches in and out of the State; (c) the railroad track in each county in this State through which it runs; giving the whole number of miles of road in the county, including the track and its branches and side and second tracks, switches and turnouts there, and the true and actual value per mile of such rail-

road in each county, stating the valuation of main track, second main track, branches, sidings, switches and turnouts separately; (d) all rolling stock owned, leased or operated, showing in separate classes: (1) The rolling stock owned; (2) the rolling stock leased or held under any conditional sale or other contract, giving such owner or operator the possession or control thereof; (3) the rolling stock used upon the line of such owner or operator, but owned by other railroad companies not owning or operating a railroad wholly or in part within this State; and (4) the rolling stock used upon such line, but owned, held or operated by corporations or companies not railroad companies, or by individuals and for each of such classes giving a detailed statement of the number and ownership of engines, car lines and cars, including passenger, mail, express, baggage, freight, sleeping, dining, parlor, refrigerator, stock and other cars of every description, and the names and addresses of the owners, and the true and actual value of all such cars used wholly or in part in this State, distinguishing between those used wholly in this state and those used partly within and partly without the State; the whole number of engines, including their appendages, used wholly or in part within this State, distinguishing between those used wholly within this State and those used partly within and partly without the same, and the true and actual value of those used wholly within the State and those used partly within and partly without the State; and the proportional value of cars and engines used partly within and partly without the State, according to the time used and the number of miles run by such cars and engines in and out of the State; and the proportional value thereof in each county in this State within which such railroad runs; (e) the depots, station houses, section houses, freight houses, machine and repair shops and machinery therein, and all other buildings, structures and appendages connected thereto or used therewith, including tool houses and the

tools usually kept therein, together with all other real estate, other than railroad track, owned or used in connection with the railroad, and not otherwise taxed, including telegraph and telephone lines, owned or used, and the true and actual value of all buildings and structures, and all such machinery and appendages, and each parcel of such real estate, including such telegraph or telephone lines, and the true and actual value thereof in each county in this State in which it is located; (f) personal property, of every kind whatsoever, including money, credits and investments wholly held or used in this State, showing the amount and value thereof in each county; (g) an itemized list of all other real property, with the location thereof, which list shall show as to each parcel whether it is assessed for taxation, and if so, by what officer or authority; (h) the capital actually employed; the total amount of bonded indebtedness, and of indebtedness not bonded; gross earnings for the year, including earnings from telegraph lines, which shall be stated separately, on the whole length of road, including the branches thereof, in and out of the State, and also such earnings within the State on way freight and passengers, and the proportion of such earning in this State on through freight and passengers carried over lines in and out of the State, to be ascertained by the number of miles the same was carried within and the number of miles without the State; and, if such owner or operator be a corporation, its actual capital stock, and the number, character, amount and market value of the shares thereof, and the amount of capital stock actually paid in; (i) gross expenditures for the year, giving a detailed statement thereof under each class or head of expenditures."

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Supreme Court of the United States

OCTOBER TERM, 1935

No. 663

WHEELING STEEL CORPORATION, *Appellant*,

v.

FRED L. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, AND KARL G. SAILER, ASSESSOR OF OHIO COUNTY, WEST VIRGINIA, *Appellees*.

BRIEF OF APPELLEES
and
APPENDIX

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Supreme Court of the United States

OCTOBER TERM, 1935

No. 663

WHEELING STEEL CORPORATION, *Appellant,*

v.

FRED L. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, AND KARL G. SAILER, ASSESSOR OF OHIO COUNTY, WEST VIRGINIA, *Appellees.*

BRIEF OF APPELLEES

OPINIONS BELOW

The references to the opinions below given in the appellant's brief are correct. The opinion of the Supreme Court of Appeals of West Virginia is reported in 115 W. Va. 553, 177 S. E. 535 *(In re Wheeling Steel Corporation Assessment).*

JURISDICTION

The appellant has filed a statement as to jurisdiction required by Rule 12, Paragraph 1, of this Court, and probable jurisdiction was noted on January 20, 1936.

STATEMENT OF THE CASE

This case involves an *ad valorem* property tax upon intangible personal property of the appellant, Wheeling

Steel Corporation, consisting of money on deposit in bank and accounts receivable. The case does not involve an income, inheritance, or privilege tax.

The history of the case is sufficiently stated in the "Statement of the Case" of appellant's brief.

From the stipulation of facts entered into by counsel in lieu of the taking of evidence, the following material statements are found:

> "The Wheeling Steel Corporation maintains its principal office in Delaware through the Corporation Service Company, a corporation, as permitted and required by the laws of Delaware. The principal office maintains a duplicate stock ledger and records of all transactions with reference to petitioner's capital stock. The originals of such ledger and records are kept in New York City. The Wheeling Steel Corporation does not have any individual office building or suite of offices in the State of Delaware, but maintains such an office as is required by Delaware laws for corporations organized in that State. Petitioner, Wheeling Steel Corporation, files such reports and pays such franchise taxes as are required by the State of Delaware to be filed and paid by a corporation organized and existing under the laws of that State.
>
> "The Wheeling Steel Corporation's general business offices are located in Wheeling, Ohio County, West Virginia, and it maintains sales offices in Atlanta, Georgia; Buffalo, New York; Cincinnati, Ohio; Detroit, Michigan; New Orleans, Louisiana; Philadelphia, Pennsylvania; San Francisco, California; Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Los Angeles, California; St. Louis, Missouri; Seattle, Washington, and New York City.

"The Wheeling Steel Corporation's general books and accounting records are kept at the Wheeling office. Plant offices maintain original detailed accounting records showing (a) materials received, (b) railroad cars received and shipped, (c) detailed labor costs, (d) production and shipments, (e) detailed stocks of goods and (f) payrolls. Employment offices are maintained at each plant.

"Sales contracts are negotiated and orders are taken by the various sales offices subject to acceptance or rejection at Wheeling.

"The Portsmouth, Ohio, plant makes up and mails out invoices for all products shipped from that plant, together with bills of lading and shipping notices. All other plants prepare complete invoices with exception of information with reference to the price of material described therein. The latter invoices are then forwarded to Wheeling where they are completed and mailed to the customer. Bills of lading and shipping notices are, however, mailed to customers from the individual plants. All invoices are payable in Wheeling.

"The majority of commercial accounts are paid by check issued in Wheeling. Payrolls are made up and payroll checks are prepared and signed at the various plants and are distributed to the employees by the respective plants. Such checks are paid with funds on deposit in banks in localities where the plants are situated.

"Under the law of Delaware, stockholders' and directors' meetings of Delaware corporations may be held within or without the State of Delaware; meetings of directors and stockholders of the Wheeling Steel Corporation are held in Wheeling. Such meetings are held in conformity with the laws of Delaware.

"The Chairman of the Board, President, Treasurer, Secretary and Chief Counsel reside at Wheeling. Local counsel are retained in the cities in Ohio in which the principal plants are located.

"The capital stock is transferable in both New York City and Wheeling, but is registerable only at the office of the Registrar in New York City. Capital stock records are maintained in New York City and at the Wheeling Steel Corporation's Delaware office.

"Dividends, when declared, are ordered to be paid and distributed at meetings held at Wheeling, although the checks are drawn and distributed by the Dividend Disbursing Agent located in New York City, and are paid with funds on deposit in banks in New York City.

"The petitioner, Wheeling Steel Corporation, owns a twelve-story office building situated in Wheeling, approximately forty-three (43) per cent of which is occupied by officers and office employees of the Petitioner." (R. 3-5.)

An additional stipulation of facts was entered into after the decision of the Supreme Court of Appeals of West Virginia and prior to the final disposition of the case by the Circuit Court of Ohio County, West Virginia, from which the additional facts appear:

"1. That the taxpayer was assessed by the State of Ohio on account of intangibles in the amount only of Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42).

"2. That when the review by the Tax Commissioner of the assessment of taxpayer's intangibles, as made by the Assessor of Ohio County, was made, neither the Assessor nor the State Tax

Commissioner was advised that Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42) of such intangibles had been assessed and the tax thereon paid in the State of Ohio.

"3. That no states other than Ohio and West Virginia have assessed taxpayer upon any of its intangibles for the year 1933.

"4. That the money on deposit in banks outside the State of West Virginia on the first day of January, 1933, had been deposited in such banks by taxpayer by sending from taxpayer's Wheeling, West Virginia, office to such banks the original checks or drafts received by taxpayer from its customers in payment for the purchase of materials, manufactured and sold by taxpayer, such checks having not first been deposited in West Virginia banks." (R. 70-71.)

• • •

"8. Of the moneys expended for payrolls, materials, new equipment, maintenance, operating expenses, and the conduct of the business in Ohio and states other than West Virginia, the moneys are expended by executive action taken at Wheeling and by the drawing of checks or drafts at Wheeling, except in connection with the payment of payrolls at its Portsmouth, Ohio, and Steubenville, Ohio, plants where payroll checks or orders are drawn, but drawn against moneys sent to banks at such points for the express purpose of meeting the payrolls and for incidental items as they arise. All moneys are controlled and the expenditures directed by the Wheeling office, and if the immediate expenditure be made elsewhere, such immediate expenditure is made only under

specific or general direction and control of the Wheeling office." (R. 71-72.)

Appellant has qualified to do business as a foreign corporation in West Virginia, Ohio, and Minnesota (R. 2).

Additional West Virginia Statutes Involved

In addition to the West Virginia statutes referred to by appellant, and set forth in the appendix to appellant's brief, the following West Virginia statutes are material and informative:

Section 4, Article 5, Chapter 40, Acts of the Legislature of West Virginia, Regular Session, 1933, relating to "In what district personalty is assessed".

Section 2, Article 5, Chapter 40, Acts of 1933, Regular Session.

(The foregoing sections are amendatory of Article 5, Chapter 11, of the Official Code of 1931.)

Section 2, Article 3, Chapter 11 of said Official Code, relating to "Lists of property for assessment purposes."

Section 4, Article 3, Chapter 11, relating to "Oath of Owner."

Section 6, Article 5, Chapter 11 of the Official Code of West Virginia, 1931, relating to the "Deduction of Indebtedness" in the assessment of intangibles, which was repealed by omission by Chapter 40 of the Acts of the Legislature of West Virginia, Regular Session, 1933, but which is presented herewith for the purpose of showing the meaning of the word "persons" as used in the tax statutes of West Virginia.

Section 11, Article 6, Chapter 11, relating to entry of public utility assessment.

Section 10, Article 2, Chapter 2 of the Official Code of West Virginia, relating to definitions, and particularly defining "person" as used in said Code.

Copies of said statutes, except the last mentioned, are set forth in the Appendix hereto.

SUMMARY OF ARGUMENT

I.

The accounts receivable and money on deposit of Wheeling Steel Corporation involved in this case have a taxable situs in West Virginia.

In re Wheeling Steel Corp. Assessment, 115 W. Va. 553; 177 S. E. 535;

Miami Coal Co. v. *Fox, Treasurer,* 203 Ind. 99; 176 N. E. 11; 79 A. L. R. 333;

New Orleans v. *Stempel,* 175 U. S. 309;

Bristol v. *Washington County,* 177 U. S. 133;

Board of Assessors v. *Comptoir National D'Escompte de Paris,* 191 U. S. 388;

Metropolitan Life Insurance Company v. *New Orleans,* 205 U. S. 395;

Liverpool L. & G. Insurance Company v. *Board of Assessors,* 221 U. S. 346;

Virginia v. *Imperial Coal Sales Company,* 293 U. S. 15;

Safe Deposit & Trust Company v. *Virginia,* 280 U. S. 83;

Commonwealth v. *United Cigarette Machine Company,* 119 Va. 447; 89 S. E. 935;

Bemis Brothers Bag Company v. *Louisiana Tax Commission,* 158 La. 1; 103 So. 337;

Buck v. *Miller,* 147 Ind. 586; 45 N. E. 647;

Higgins v. *Commonwealth,* 126 Ky. 211; 103 S. W. 306;

Finch v. *York County,* 19 Neb. 50; 26 N. W. 589.

II.

The statutes of West Virginia under which appellant's intangible property was assessed, as interpreted by the State Courts, are not in violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution when considered in connection with the statutes relating to the assessment of like property of either natural persons or public utility corporations.

Section 1, Article 5, Chapter 11 of the Code of West Virginia, as amended by Chapter 40, Acts of the Legislature of West Virginia, Regular Session, 1933 (Appellant's Brief, Appendix, p. 55).

Section 12, Article 3, Chapter 11 of the Code of West Virginia, amended by Chapter 38, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933 (Appellant's Brief, Appendix, p. 50).

Section 13, Article 3, Chapter 11 of the Code of West Virginia (Appellant's Brief, Appendix, p. 52).

Section 2, Article 3, Chapter 11, Code of West Virginia (Appendix herewith, p. 1).

Section 4, Article 3, Chapter 11, Code of West Virginia (Appendix herewith, p. 2).

Section 2, Article 6, Chapter 11, Code of West Virginia (Appellant's Brief, Appendix, pp. 59-61).

Section 11, Article 6, Chapter 11, Official Code of West Virginia (Appendix herewith, p. 6).

Section 15, Article 3, Chapter 11, Code of West Virginia, amended by Chapter 40, Acts of the Legislature, Regular Session, 1933 (Appellant's Brief, Appendix, p. 53).

Section 2, Article 5, Chapter 40, Acts of the Legislature, Regular Session, 1933 (Appendix herewith, p. 3).

Section 4, Article 5, Chapter 40, Acts of the Legislature, Regular Session, 1933 (Appendix herewith, p. 4).

Section 10, Article 2, Chapter 2, Official Code of West Virginia.

Section 6, Article 5, Chapter 11, Official Code of West Virginia (Appendix herewith, p. 5).

ARGUMENT

I.

THE ACCOUNTS RECEIVABLE AND MONEY ON DEPOSIT OF WHEELING STEEL CORPORATION INVOLVED IN THIS CASE HAVE A TAXABLE SITUS IN WEST VIRGINIA.

It is readily agreed that a state may not tax property over which it has no jurisdiction. Stated otherwise, a state may not tax property which does not have a taxable situs within its territorial limits. Should a state collect *ad valorem* taxes from a person or corporation with respect to property which does not have a taxable situs within the state, such person or corporation would be deprived of property without due process of law.

Likewise, we expressly say that we do not regard the State of West Virginia as a residuary legatee, so to

speak, with respect to taxation, or claim that the State of West Virginia may tax the intangible property here involved merely because the record does not show such intangible property to be taxed elsewhere.

We also agree with counsel for appellant, and in fact assert, that, generally, the taxable situs of accounts receivable and of money in bank is at the domicile of the owner, (*Baldwin* v. *Missouri*, 281 U. S. 586, 591; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1, 8.)

However, accounts receivable and money on deposit in banks may acquire a situs for purposes of taxation at some place other than the technical domicile of the owner. (See cases cited under Point I, Summary of Argument, pages 7-8 herein.)

Our position in this case is that the accounts receivable and bank deposits of Wheeling Steel Corporation have acquired a taxable situs in West Virginia, and that they have no taxable situs in Delaware, the technical domicile of the corporation, and that the record does not show the acquisition of a taxable situs in any other state by any part of said intangibles, though we have not assigned cross error to the judgment of the Supreme Court of Appeals of West Virginia in deducting $250,133.42 from the assessment as originally approved by the tax commissioner, upon the mere showing that said amount had been assessed in the State of Ohio.

When intangibles acquire a situs for taxation at a place other than the technical domicile of the owner it is said that they have acquired a "business situs" as distinguished from a domiciliary situs. In the case of *Commonwealth* v. *United Cigarette Machine Company*, 119 Va. 447, 89 S. E. 935, 939-40, what is commonly referred to as a "business situs" is designated a "commercial domicile," which phrase, we believe, quite aptly describes the situation.

The cases cited above under Point I of Summary of Argument and relating to business situs, with the exception of the case of *Miami Coal Company* v. *Fox, Treasurer,* 203 Ind. 99, 176 N. E. 11, have ordinarily dealt with situations in which the principal business of the person or corporation has been conducted in fact in the state of the technical domicile of the owner, but a branch or part of such business has been relatively permanently established and conducted in some other state in such a manner as to permit its reasonable separation and identification from the other general business of the person or corporation and has been conducted by an agent or representative. It is characterized essentially by a localized management and control, which gives the activities such a character as they would have if they were in fact conducted in the state of business situs by a resident corporation or individual. (See *Bristol* v. *Washington County,* 177 U. S. 133, 143-4; *Metropolitan Life Insurance Company* v. *New Orleans,* 205 U. S. 395, 402; *Liverpool L. & G. Insurance Company* v. *Board of Assessors,* 221 U. S. 346, 356-7.)

Our position here is that just as a part of the business of an individual or of a corporation may be localized in a state other than that of the technical domicile, so may all of such business become so localized if in fact the corporation is not doing business and is not managing and controlling its assets and operations in the state of its technical domicile, but is, in fact, managing, keeping, and controlling its assets and business in another state. In other words, what may be true of a part may also be true of the whole.

Here Wheeling Steel Corporation has not merely localized a part of its business in West Virginia through

the activities of an agent, but has localized its entire fiscal management in West Virginia through its principals.

Counsel for appellant (Br. 13) say that the Supreme Court of Appeals of West Virginia concluded that, "its (appellant's) entire business had been localized in West Virginia * * *." We do not believe that the language of the Supreme Court of Appeals of West Virginia goes quite that far, and we do not believe that it is necessary for the Court to go so far in order to sustain the position of the appellees. All of the manufacturing business of appellant has not been so localized in West Virginia, but it is believed that it is sufficient for the purposes of *ad valorem* property taxes upon the intangibles of appellant that the business of keeping, managing and controlling all of such intangibles has been localized in West Virginia. This, we believe, the record here shows.

The theory that intangible personal property can be taxed only when related to the taxation of real estate or tangible personal property was rejected by this Court in the case of *Virginia* v. *Imperial Coal Sales Company*, 293 U. S. 15, 20.

In appellant's brief the position is frequently asserted that the intangibles of appellant were not derived entirely from manufacturing activities within the State of West Virginia. This is true, and were we considering an income tax, such position might be material. But we are not considering an income tax, but an *ad valorem* property tax upon intangible property. The source of the property is not determinative. That which is determinative, is the situs of the intangible property on the assessment date. West Virginia, of course, cannot tax the personal property, iron and steel, manufactured by appellant and located in the State of Ohio. Obviously,

however, if such iron and steel were removed from Ohio to West Virginia, West Virginia could then tax it as tangible personal property, and the source from which it was obtained by Wheeling Steel Corporation would not be material. Likewise, if the iron and steel be not removed to West Virginia, but be exchanged for money or accounts receivable, and in the course of the transaction such money or accounts receivable be transferred to West Virginia, then West Virginia may impose an *ad valorem* property tax upon such intangibles just as though the State might have imposed such a tax upon the tangible iron and steel had it been removed into the State of West Virginia.

It is believed that the decisions of this Court establish beyond any question the principle of business situs or commercial domicile of intangible property for purposes of *ad valorem* property taxation. (*New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *Board of Assessors* v. *Comptoir National D'Escompte de Paris*, 191 U. S. 388; *Metropolitan Life Insurance Company* v. *New Orleans*, 205 U. S. 395; *Liverpool L. & G. Insurance Company* v. *Board of Assessors*, 221 U. S. 346.)

It is significant to note that in the cases of *Baldwin* v. *Missouri*, 281 U. S. 586, 593; *Farmers Loan & Trust Company* v. *Minnesota*, 280 U. S. 204, 213; *First National Bank of Boston* v. *Maine*, 284 U. S. 312, 330; and *Biedler* v. *South Carolina Tax Commission*, 282 U. S. 1, 9, in each of which cases an inheritance tax was involved, and it was held that the inheritance tax could not be imposed upon the particular intangibles involved by a state other than that of the technical domicile of the owner, the Court was careful to point out that the intangible personal property involved had not acquired a business situs in the state which sought to impose the taxes.

By way of illustration is was observed in the case of the *First National Bank* v. *Maine,* 284 U. S. 312, 331:

> "We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See Farmers Loan & T. Co. Case, supra (280 U. S. 213, 74 L. ed. 375, 65 A. L. R. 1000, 50 S. Ct. 98). That question heretofore has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."

However, it would seem that this is the first time there has been presented to this Court a case in which the corporation transacts no business whatever within the state of its technical domicile, but, to the contrary, transacts all of its commercial activities in some other state. In view of the extended modern practice of effecting incorporation in one state for the express purpose of transacting business in another state as a foreign corporation, it may be rather surprising that such a case has not heretofore been presented to this Court, but an extended review of the decisions has not lead us to any case considered by this Court involving a state of facts entirely analogous to that here presented.

The case of *Miami Coal Company* v. *Fox,* 203 Ind. 99, 176 N. E. 11, presents with exactness, but in the converse, our position here.

In the *Miami* case the company was an Indiana corporation. Indiana was its domicile. In Indiana it operated coal mines and all of its intangibles resulted from the mining of coal in Indiana. However, its coal was sold from Illinois and its financial affairs were managed and controlled in Illinois. It was held by the Supreme

Court of Indiana that the intangibles of the Miami Company had no taxable situs in Indiana but that the taxable situs was in Illinois.

In the case at bar not all of the iron and steel of appellant is manufactured in Ohio; approximately twenty-four percent is manufactured in West Virginia (R. 7). But forgetting, for purposes of argument, the production in West Virginia, and assuming that all of the iron and steel of the appellant, the sale of which resulted in its money and intangibles, was produced in Ohio, it is sold from Wheeling, West Virginia (R. 4), and collections are made at Wheeling (R. 4); all financial management is in Wheeling (R. 4). Certainly, upon the authority of the *Miami* case the taxable situs of the intangible property of appellant is in West Virginia and not in Ohio.

While it is sometimes stated that intangibles have no situs, it is not believed that such statement is intended to be accepted literally, but that it is meant that they have no physical situs susceptible of observation, as has real estate or tangible personal property. *(First National Bank of Boston* v. *Maine,* 284 U. S. 312, 328.) Intangibles do have a place of being which may be called a taxable situs. If they have a being or existence, which they, of course, have, they must exist somewhere. We believe their existence and taxable situs is at the place where they are owned, managed, and controlled. *(Liverpool L. & G. Insurance Company* v. *Board of Assessors,* 221 U. S. 346, 356; *Virginia* v. *Imperial Coal Sales Company,* 293 U. S. 15, 19; *Safe Deposit & Trust Company* v. *Virginia,* 280 U. S. 83, 92.)

Can it be said that the intangibles of appellant have any existence, being, or taxable situs in Delaware, the state of appellant's technical domicile, or domicile of origin? Certainly, the intangibles have no situs in Delaware under the authority of the *Miami* case.

The rule that the taxable situs of intangibles is at the technical domicile of the owner is but a mere fiction, and will not be followed when the facts are clear that the intangible property has a situs elsewhere. Thus, in the case of *Bristol* v. *Washington County,* 177 U. S. 133, 141, it was observed:

> "For many purposes the domicil of the owner is deemed the situs of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual situs of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned,—at the domicil of the creditor. The creditor, however, may give it a business situs elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business."

See also *State Board of Assessors* v. *Comptoir National, etc.,* 191 U. S. 388, 404; *Safe Deposit & Trust Company* v. *Virginia,* 280 U. S. 83, 92.

In the case of *Virginia* v. *Imperial Coal Sales Company,* 293 U. S. 15, the intangibles taxed were managed and controlled in Virginia and held subject to *ad valorem* property taxation there. It so happened that the corporation owning the intangibles was a Virginia corporation so that the situs of management and control was the same as the technical domicile. It is significant to note, however, that the decision in that case was not placed

solely upon the ground that the corporation was a Virginia corporation, but, as well, for the reason that the intangibles there involved were managed and controlled within the State of Virginia. It was observed (293 U. S. 19):

> "The money on hand, and the bills and accounts receivable, the excess of which over bills and accounts payable was assessed, had their *situs* in Virginia. Respondent is a domestic corporation with its principal office in that State *where the proceeds of its accounts receivable are collected and deposited in bank.* Such credits and accounts are regarded as situated at the domicile of the creditor and that domicile establishes a basis for taxation." (Italics ours.)

There is nothing in the case to suggest that had the business functions of the Imperial Coal Sales Company been performed in Ohio or in some other state and had nothing been done in Virginia except to perform the technicalities necessary to preserve its corporate existence, such intangibles would have a taxable situs in the State of Virginia.

In the case of *Safe Deposit & Trust Company* v. *Virginia,* 280 U. S. 83, it was held that the taxable situs of certain intangibles was in Maryland where the same were managed and controlled by the Safe Deposit & Trust Company of Baltimore, rather than in Virginia, the place of domicile of the beneficial owners. Of course the trust company held legal title and the trust company was domiciled in Maryland. It may be that the legal ownership constituted a sufficient basis for the determination of the case, nevertheless, the opinion commented upon the fact that the actual presence and control of the intangibles were elsewhere than at the domicile of the beneficiaries. It was observed (280 U. S. 92):

> "Ordinarily this court recognizes that the fiction of mobilia sequuntur personam may be applied in order to determine the situs of intangible personal property for taxation. *Blodgett* v. *Silberman,* 277 U. S. 1, 72 L. ed. 749, 48 Sup. Ct. Rep. 410. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere and ought not to be applied if so to do would result in inescapable and patent injustice whether through double taxation, or otherwise."

Following which observation reference was made to many of the "business situs" cases to which we have heretofore referred.

The Pertinent Facts with Respect to the Business Activities of Appellant as Stipulated by Counsel

Wheeling Steel Corporation maintains its principal office in Delaware, through the Corporation Service Company (R. 3).

It does not have any individual office building or suite of offices in the State of Delaware (R. 3).

The record does not show the performance of a single executive act in Delaware. Apparently all that is done in Delaware is to maintain there, through the Corporation Service Company, a duplicate stock register and record of all transactions with reference to appellant's capital stock (R. 3).

Even the meetings of stockholders and of directors are not held in Delaware but are held in Wheeling, West Virginia (R. 4).

While the record shows that the principal officers, namely, the chairman of the board, the president, the treasurer, the secretary, and the chief counsel (R. 4), reside at Wheeling, and presumably have their offices

there, it does not appear that any officer resides in or has any business office in the State of Delaware.

The general business offices are at Wheeling (R. 3).

The general books and accounting records are kept at Wheeling (R. 4).

Sales contracts (regardless of the place from which the materials are shipped) are made subject to acceptance or rejection at Wheeling (R. 4).

All invoices are payable at Wheeling (R. 4).

The majority of commercial accounts are paid by checks issued at Wheeling (R. 4).

Payrolls are made up, and payroll checks made and signed at the various plants (R. 4), but drawn (R. 71-72) against moneys sent for the particular purpose from the Wheeling office, and which funds, of course, are but temporarily in the states, other than West Virginia, in which the plants are.

Dividends, when declared, are ordered to be paid at Wheeling (R. 5).

Original stock records are kept in New York (R. 3) and dividends are disbursed from New York (R. 5), but appellant is not even admitted to do business as a foreign corporation in New York (R. 2).

Sales offices are maintained in several states (R. 3), but appellant is not admitted to do business in any of said states except the State of Ohio; and, as above noted, even the sales made through these sales offices are subject to acceptance or rejection at Wheeling (R. 4).

The Ohio Assessment

The record shows (R. 13) that appellant has been assessed in Ohio with $250,133.42 accounts and notes receivable (apparently no money in banks) and that the plan of assessment is:

"In order to determine the amount of accounts receivable of a foreign corporation subject to taxation in Ohio, the Ohio statutes provide that current accounts payable shall be deducted from the total of current accounts receivable and prepaid items, and that the result shall be apportioned in accordance with the ratio of current accounts receivable arising from business transacted within Ohio to the total current accounts receivable. Under these Ohio statutes the Wheeling Steel Corporation *has been assessed as of January 1, 1933, on accounts and notes receivable amounting to $250,133.42,* which amount is included in the total amount of accounts and notes receivable assessed against the Wheeling Steel Corporation by the Assessor of Ohio County and the Tax Commissioner as of January 1, 1933." (R. 13.) (Italics ours.)

It is also stipulated:

"1. That the taxpayer was assessed by the State of Ohio on account of intangibles in the amount only of Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42).

"2. That when the review by the Tax Commissioner of the assessment of taxpayer's intangibles, as made by the Assessor of Ohio County, was made, neither the Assessor nor the State Tax Commissioner was advised that Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42) of such intangibles had been assessed and the tax thereon paid in the State of Ohio." (R. 70.)

Counsel for appellant, referring to the Ohio plan of assessment, say (Br. 27):

> "* * * This deduction of current indebtedness accounts for the fact that intangibles amounting only to $250,133.42 were taxed in Ohio as *at* January 1, 1933, but the formula for determining receivables taxable in Ohio takes into consideration all the accounts receivable arising from business transacted within Ohio. * * *"

Apparently the suggestion is that a much larger sum of accounts receivable was actually assessed in Ohio, but that the net amount was only $250,133.42 by reason of the deduction of current accounts payable.

It is not believed that the record sustains the suggestion contained in the statement of counsel. The record does not show that appellant owed any current accounts payable anywhere, or the amount thereof. Even though the Ohio rule may permit deduction of current indebtedness, nothing in the record shows that there was, in fact, any such deduction. Nothing affirmatively appears in the record indicating that more than $250,133.42 of accounts receivable were returned to the taxing authorities of Ohio. To the contrary, the provision of the stipulation (R. 13) above quoted shows that appellant, "has been assessed as of January 1, 1933, on accounts and notes receivable amounting to $250,133.42." The statement is not that appellant had been assessed in Ohio on accounts and notes receivable in an amount larger than that figure but netting that figure by reason of deductions. Likewise, in the additional stipulation filed after the judgment of the Supreme Court of Appeals of West Virginia it was stipulated (R. 70) that at the time of the assessment of the appellant's intangibles, "neither the Assessor nor the State Tax Commissioner was advised that Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42) *of such intangibles* had been

assessed and the tax thereon paid in the State of Ohio." (Italics ours.)

It is also expressly stipulated (R. 70) that appellant was assessed by the State of Ohio, "on account of intangibles in the amount only of Two Hundred Fifty Thousand One Hundred Thirty-three Dollars and Forty-two Cents ($250,133.42)."

Appellant knew of its return on intangibles to the taxing authorities of the State of Ohio. At the time the additional stipulation was made appellant had knowledge that the Supreme Court of Appeals of West Virginia had indicated that there should be deducted from the intangibles of appellant so much thereof as were taxable in the State of Ohio, and that the case had been remanded by the Supreme Court of Appeals of West Virginia to the Circuit Court of Ohio County, West Virginia, to permit the showing of further deductions from the assessment as corrected by the tax commissioner because of assessments in other states than West Virginia of more than the $250,133.42, if such could be shown (R. 66). Nevertheless, appellant in the stipulation has made no showing that it owed any current accounts payable or that any accounts receivable were reported to or assessed in any way by the State of Ohio, other than the $250,133.42. The words "of such intangibles" refer, of course, to the intangibles which the Assessor of Ohio County, West Virginia, and the State Tax Commissioner of West Virginia had held assessable in the State of West Virginia.

Furthermore, there is nothing in the record indicating that the Ohio assessment was at less than actual value of the accounts receivable reported. Had a larger amount of intangibles been reported to the taxing authorities of Ohio ar appropriate statement would not have been that the taxpayer was assessed by the State of Ohio, "on account of intangibles in the amount of

$250,133.42," but would have been that appellant was assessed in the State of Ohio on account of intangibles (by way of illustration) in the amount of $1,500,000, which, by reason of the deduction of current accounts payable of $1,250,000.00, netted an assessment of $250,000.00 (in round figures).

We have assigned no cross error to the judgment of the Supreme Court of Appeals of West Virginia directing the deduction of $250,133.42 assessed in Ohio, although the only reason assigned for said deduction by the Supreme Court of Appeals of West Virginia was (R. 66), "for the purposes of this opinion, we assume that the claim of our sister state is well founded, and should be deducted from the assessment as corrected by the Tax Commissioner." It is submitted, however, that the record does not show a taxable situs in the State of Ohio, of any of appellant's accounts receivable. We do not concede that the voluntary return of accounts receivable by the appellant to the taxing authorities of Ohio and the payment of taxes thereon, when the record does not show any taxable situs in the State of Ohio, deprives the State of West Virginia of the right to tax all of the intangibles of appellant which the record, we believe, shows to have a taxable situs in West Virginia.

II.

THE STATUTES OF WEST VIRGINIA UNDER WHICH APPELLANT'S INTANGIBLE PROPERTY WAS ASSESSED, AS INTERPRETED BY THE STATE COURTS, ARE NOT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION WHEN CONSIDERED IN CONNECTION WITH THE STATUTES RELATING TO THE ASSESSMENT OF LIKE PROPERTY OF EITHER NATURAL PERSONS OR PUBLIC UTILITY CORPORATIONS.

Appellant contends that the statutes of West Virginia deny it the equal protection of the laws because, as

interpreted by the Supreme Court of Appeals of West Virginia, they require the assessment of all of appellant's intangibles, while said statutes require the assessment of only such intangibles of individuals as have been derived from business conducted within the State of West Virginia, and while the only intangibles of public utility corporations, particularly railroads, required to be taxed in West Virginia are the intangibles, "held or used" in the State.

Appellant's error results from a failure to consider all of the pertinent statutes.

Section 1, Article 5, Chapter 11 of the Official Code of West Virginia, 1931, as amended by Chapter 40, Acts of the Legislature of West Virginia, Regular Session, 1933, specifies what personal property is taxable in the State of West Virginia. (This statute is set forth in full in the Appendix to appellant's brief, p. 55.) It is observed that it is provided, "all personal property belonging to persons residing in this state, whether such property be in or out of the state," shall be entered on the personal property books, except that, "personal property of all classes * * * belonging to residents of this state, which is actually and permanently located in another state, and by the laws of such other state is subject to taxation and is actually taxed in such other state, shall not be entered on the personal property book, or be taxed in this state." With respect to non-residents, the same section provides, "all personal property *in the state,* though owned by persons residing out of the state, shall be entered in the personal property book."

Thus it appears that the personal property subject to taxation in the State of West Virginia is all personal property in the state. There is no provision that there be taxed any personal property not in the state, of non-

residents, and there is excepted, even with respect to residents, personal property not in the state.[1]

The foregoing statute is predicated upon Section 1, Article X of the Constitution of West Virginia which is set forth in full in Appendix to appellant's brief, p. 49, and which, in so far as pertinent herein, provides, "All property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law." That intangibles are included within this provision is manifest from their specific mention in the classification for purposes of taxation made by said section.

This provision of the Constitution, and the statute, Section 1, Article 5, Chapter 11 of the Code, as amended as aforesaid, define and specify the property subject to taxation by the State of West Virginia, including intangibles, to be property which is in the state. The statute clearly recognizes the business situs principle with respect both to property of residents when such property is not in West Virginia and to property of non-residents when such property is within the State of West Virginia.

That the word "persons" mentioned in said Section 1, Article 5, Chapter 11, includes corporations is clear from the provisions of Section 10, Article 2, Chapter 2 of the Official Code, which provides:

> "The following rules shall be observed in the construction of statutes, unless a different intent

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[1]It is not believed that the condition of the exception of property permanently located in another state, of residents, that the same shall actually be taxed in another state is material. If such property is actually and permanently located in another state, then it does not have a taxable situs in West Virginia and it is not taxable there, whether or not it be taxed in another state. It may be that the said provision was originally designed as a relinquishment of the principle of *mobilia sequuntur personam* with respect to intangible property of residents only when such property was actually taxed elsewhere.

on the part of the legislature be apparent from the context: * * * .

"The word 'person' or 'whoever' shall include corporations, societies, associations and partnerships, if not restricted by the context; * * *."

This is further shown by the provisions of Section 6, Article 5, Chapter 11 of the Official Code relating to the deduction of indebtedness from the assessment of intangibles. This section has been repealed by omission from Chapter 40, Acts of the Legislature of West Virginia, Regular Session, 1933, but is informative here inasmuch as it uses the word "persons" and does not use the word "corporations," while, for many years prior to its repeal, corporations and individuals alike availed themselves of the deductions therein provided for.

Chapter 38, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, amending Section 12, Article 3, Chapter 11 of the Code of West Virginia, prescribes the report required to be made to the assessor by a corporation (this statute is set forth in full in Appendix to appellant's brief, p. 50). Among the items required to be reported are:

"* * *

"(c) the amount of money on hand or on deposit anywhere subject to its check or draft, on the first day of the assessment year; (d) the amount of credits and investments other than its own capital stock held by it on said date, with their true and actual value; * * *."

Section 13, Article 3, Chapter 11 of the Official Code (this statute is set forth in full in Appendix to appellant's brief, p. 52) provides what property of the corpo-

ration shall be assessed, that being, "all the property of such corporation liable to taxation." True, said section provides, "all property mentioned in items (c) and (d) shall, together with their valuation, be entered in the personal property book of the county, * * *" but obviously, this reference to all property mentioned in said items (c) and (d) is clarified by the preceding provision of the same section, that there is taxable only "all the property of such corporation liable to taxation," which has in turn been specified by said Section 1, Article 5, Chapter 11 of the Code, as amended as aforesaid, and which is limited to property within the state. In fact, in Section 12, Article 3, Chapter 11, in providing for the report, it is clear that the provisions thereof relate only to property subject to taxation in this state, since it is provided, "Each incorporated company foreign or domestic having its principal office or chief place of business in this State, *or owning property subject to taxation in this State,* * * *" shall make a report, etc. (Italics ours.)

This is the interpretation given said Section 13, Article 3, Chapter 11 by the Supreme Court of Appeals of West Virginia in its opinion in this case (R. 65). It is believed that the interpretation of the statute by the Supreme Court of Appeals of West Virginia is conclusive. (See *Swiss Oil Corporation* v. *Shanks,* 273 U. S. 407; *Quong Ham Wah Company* v. *Industrial Accident Commission,* 255 U. S. 445; *Supreme Lodge* v. *Meyer,* 265 U. S. 30; *Brown-Forman Company* v. *Kentucky,* 217 U. S. 563; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 105.)

Section 15, Article 3, Chapter 11 of the Code of West Virginia, as amended by Chapter 40, Acts of the Legislature of West Virginia, Regular Session, 1933, provides for the assessment of property used in business by an

individual (this statute is set forth in full in Appendix to appellant's brief, p. 53), and that particular section refers to money derived from such trade or business and credits arising from such business. It is clear, however, that the purpose of this statute is to define the place within the State at which such property used in business by a natural person shall be taxed, just as does the provision of said Section 13, Article 3, Chapter 11 relating to the entry of corporate property provide, "If a company have branches, each branch shall be assessed separately in the county and magisterial district where its principal office for transacting its financial concerns is located; * * *." But there are other statutes relating to the assessment of the property of individuals. Section 2, Article 5, Chapter 40 of the Acts of the Legislature of West Virginia, Regular Session, 1933 (set forth in full in Appendix herewith, page 3), provides that the assessor shall enter the names of owners of personal property showing separately the value of, "(3) All money, notes, bonds, bills and accounts receivable, stocks and any other intangible personal property; * * *."

Section 4, Article 5, Chapter 40 of said Acts of 1933, Regular Session, provides:

> "Every person required by law to list personal property for taxation shall list the tangible personal property in the magisterial district wherein it is on the first day of the assessment year * * *; and he shall list for taxation in the magisterial district in which he resides the money, notes, bonds, bills and accounts receivable, stocks and other intangible personal property subject to taxation belonging to himself or under his charge or control, whether the same, or the evidence thereof be in or out of the state; but capital, money and intangible property (except real estate

> and chattels real) employed in any trade or business (other than agriculture) belonging to a company whether it is incorporated or not, or to an individual, shall be assessed for taxation in the magisterial district wherein the principal office for the transaction of the financial concerns pertaining to such trade or business is located; or, if there be no such office, then in the district where the operations are carried on. * * *."

Thus, it is clear that said Section 4, Article 5, Chapter 40 requires all of the property within the state owned by an individual to be taxed and that that which is not identified with a business shall be taxed in the magisterial district in which the individual owner resides, while, as provided by Section 15, Article 3, Chapter 11, that which is used by the individual in trade or business is assessed in the magisterial district in which the trade or business is conducted.

Appellant has referred to the statute requiring reports by corporations (Sec. 12, Art. 3, Chapter 11). Section 2, Article 3, Chapter 11 of the Official Code provides for the canvass by the assessor and the giving of information by the person of all personal property of which the person was the owner on the first day of January of the current year; and the taxpayer is required to make report under oath in language substantially the same as the oath required to be made on behalf of the corporation (Section 12, Article 3, Chapter 11, as shown in Appendix to appellant's brief, p. 51). Section 4, Article 3, Chapter 11, providing the oath, is set forth in full in the Appendix hereto, page 2.

It is believed that an examination of the several statutes herein referred to and set forth in the Appendix herewith, in conjunction with those set forth in the Appendix to appellant's brief, will show that there is no

discrimination between the assessment of intangibles of corporations, either foreign or domestic, and natural persons.

It is further contended by counsel for appellant that there is a discrimination between business corporations, such as the appellant, and public utility corporations, and by way of illustration appellant sets forth (Appendix, p. 59) the provisions of Section 2, Article 6, Chapter 11 of the Code of West Virginia relating to railroads, and points out that a railroad corporation is required to report, "(f) personal property, of every kind whatsoever, including money, credits and investments *wholly held or used in this State*, * * *." (Italics ours.)

The words "held or used in this State" are merely a designation that such property and credits are to be reported only when they are in the state. It is just another way of saying that the railroads shall report their money and accounts which have a situs in the State of West Virginia. The record here shows that the moneys and accounts receivable of appellant are held and used in the State of West Virginia. If such were not so, they would have no taxable situs in the state. The words "held or used" have the same purpose in said Section 2, Article 6, Chapter 11 that the words "in the state" as used in Section 1, Article 5, Chapter 40 of the Acts of the West Virginia Legislature, Regular Session, 1933, have in defining what personal property is taxable in the State of West Virginia.

The requirement that a business corporation report all of its intangibles, wherever held, means, when considered together with the other statutes herein referred to, all intangible property subject to taxation in West Virginia or having a taxable situs therein. Even should other intangibles be reported, they are not assessed and taxed because the entry of the assess[illegible] Section 13, Article 3,

Chapter 11) is only of the property "liable to taxation." Section 1, Article 5, Chapter 11 shows clearly what property is liable to taxation.

Appellant has shown no facts of discrimination with respect to it and any other taxpayer, either business corporation, public utility corporation, or natural person. It is believed that the pertinent statutes plainly show a constant purpose and intent to tax all intangibles within the state and to tax no intangibles which are without the state. However, even though the statute were susceptible of an interpretation, which, if adopted, would result in discrimination against appellant, no showing of any administrative action which is discriminatory in fact is presented.

It is believed that if appellant would rely upon discrimination or the denial of the equal protection of the laws it would be incumbent upon appellant to show such discrimination or denial by the record in this case. This, appellant has not done, we believe, because it cannot be done, since the tax laws of West Virginia as administered, as well as enacted, are not discriminatory, but treat all alike, persons and corporations, with respect to *ad valorem* property taxation, and thus extend fully the equal protection of laws to all persons.

REPLY TO MISCELLANEOUS STATEMENTS OF APPELLANT'S BRIEF AND COMMENT UPON APPELLANT'S AUTHORITIES.

It is believed that the foregoing portions of appellee's brief discussing the matter of business situs and showing the absence of inequality from the statutes of West Virginia relating to property taxes, constitute a reply to the two principal contentions of appellant, namely, that the intangibles of appellant have no taxable situs in West Virginia and that the West Virginia *ad valorem*

property tax statutes deny appellant the equal protection of the laws guaranteed to the appellant by the Fourteenth Amendment to the Constitution of the United States. It is hoped, however, that brief comment upon some of the statements of appellant's brief may serve to further clarify the presentation of this case.

The Interpretation of Section 12, Article 3, Chapter 11 of the Code of West Virginia

In appellant's brief (pp. 40 ff.) it is contended that Sections 12 and 13 of Article 3, Chapter 11 of the Code of West Virginia require the taxation of all of the intangibles of a non-resident corporation doing business in the State of West Virginia, wherever such intangibles may be situated. We believe that all of the intangibles of appellant are taxable in West Virginia, not because of any confusion in the statutes of West Virginia but because such intangibles of appellant have a taxable situs in West Virginia. We do not contend that the statutes of West Virginia require the taxation of all intangibles of every foreign corporation doing business in the State of West Virginia, merely because some business is done in the State of West Virginia.

We have heretofore pointed out that the decision of the Supreme Court of Appeals of West Virginia in this case was that said Sections 12 and 13 provide for the taxation by the State of West Virginia of only such intangibles of non-resident corporations as are within the State of West Virginia. From appellant's brief (pp. 6-7) it clearly appears that appellant upon the advice of counsel purported to report to the assessor of Ohio County, West Virginia, originally, only its intangibles taxable in West Virginia. Thus, it appears that appellant understood said statutes to mean just what we here contend that they mean and just what the Supreme

Court of Appeals of West Virginia has held that they mean. The difference in the positions of appellant and appellees is not in the interpretation of these statutes but is in the determination of what intangible property is within the State of West Virginia—meaning what intangible property has a taxable situs in the state.

In this connection it is significant to note that the Constitution of Louisiana, from which state several of the "business situs" cases arose, provided: "All property shall be assessed in proportion to its value" *(State Board of Assessors* v. *Comptoir National D'Escompte de Paris,* 191 U. S. 388, 404), which is almost literally the same language, in part, found in Section 1, Article X, Constitution of West Virginia (Appendix, Appellant's Brief, p. 49), and, in the case just referred to, as well as in others, this provision was referred to as having significance in determining that the intangible property in those cases involved was taxable in the State of Louisiana.

Allocation of Intangibles and the Case of Union Refrigerator Transit Company v. Kentucky, 199 U. S. 194

Counsel for appellant seem to rely upon the case of *Union Refrigerator Transit Company* v. *Kentucky, supra,* in contending that the intangible property of appellant should be apportioned among the several states in which it does business, according to the assessed value of real estate and tangible personal property in said states.

The *Union Refrigerator* case involved tangible personal property, railroad cars, and did not hold that the personal property actually within a state should be allocated for purposes of taxation between the several states in which business was done, as is contended by appellant here. No one car was in the State of Kentucky all the time, while all of the cars were actually in many

states a part of the time. This decision is usually accepted as one approving an allocation of railroad rolling stock upon some reasonable basis, the basis of a percentage of gross receipts (used by the Kentucky court in the *Union Refrigerator* case), a basis of miles operated within the state as compared with total miles operated, or other principle, though this case approved no particular method.

This case rejected the contention that all of the two thousand cars were in Kentucky, following the principle *mobilia sequuntur personam,* merely because the Union Refrigerator Company was a Kentucky corporation. Here, there is no showing by the record that the money on deposit and accounts receivable of appellant have not been in the State of West Virginia, as we contend under the commercial domicile principle, all the time, and were not in West Virginia on the tax assessment date.

Appellant's Real Contention

Appellant says (Br. 15), "The use of tangible property, both real and personal, in business, creates intangible property, and it is submitted that the only fair rule for the taxation of property in states other than the state of the domicile is a rule which allocates intangibles on the basis of tangible property owned and used in production of material for sale. Such a rule will permit each state in which tangible property is located and operated for profit to tax a fair proportion of the intangible property created within its borders." It is believed that this statement in reality accurately presents appellant's position. With this position we do not agree. It is believed that the error of appellant's position results from a misconception of the nature of *ad valorem* property taxation. *Ad valorem* taxation is predicated upon the existence of property subject to taxation within the taxing state, not upon the source from which such property may have

come or where, in the case of intangible property, it may ultimately be expended. If the property is not in the State of West Virginia it is not subject to taxation by the State of West Virginia, even though it may have arisen from West Virginia. Likewise, if the property is in West Virginia it is taxable in West Virginia, even though it may have arisen elsewhere. Property can neither be taken out of the State of West Virginia nor brought into the State of West Virginia by the attempted application of any supposed rule of equitable allocation.

Counsel for appellant refer to the supposititious situation of two Delaware corporations doing business in West Virginia and other states, one having executive offices in West Virginia and one having executive offices in another state, and ask whether the Fourteenth Amendment would permit the taxation of intangible property of one in West Virginia and not the other. Our position is that the intangible property held in West Virginia by the one is taxable in West Virginia while the intangible personal property held by the other in another state is not taxable by West Virginia, even though such intangibles may have arisen from business or manufacturing activities conducted beyond the territorial limits of either state. If the general business offices of Wheeling Steel Corporation, operating in the manner shown by this record in Wheeling, were not in Wheeling, but were in Ohio, we have no hesitation in saying that the intangibles would not be taxable in West Virginia.

Likewise, we say that, with respect to intangibles of the character here involved, the transfer of taxable situs for *ad valorem* property taxation would be effected from New York to New Jersey upon the illustration of the case of *Adams Express Company* v. *Ohio State Auditor*, (166 U. S. 185 at 224 not 185 U. S. 224), quoted in appellant's brief (Br. p. 17). The difference between this case and the *Adams Express Company* case is that in the *Adams*

Express Company case the intangible property there under consideration was not money and accounts receivable, which the decision recognizes might have a special situs, (166 U. S. 222) but the intangible value of franchises, contracts, privileges, and the like, (166 U. S. 223) represented by the difference between the actual investment of the express company in tangible property and its going-concern value. The case held that such intangible value was assessable, but, of course, that intangible value was so identified and non-separable from the tangible property of the express company as to require its distribution upon substantially the same basis as was its tangible personal property actually distributed by actual presence among the several states in which the company operated, because such franchises, privileges and contracts were actually had, made, performed, controlled and managed in the several states. This case did not involve money in bank or accounts receivable, the situs of which is clearly separable from the real estate and tangible personal property from which it may have been derived.

We have heretofore pointed out that the case of *Virginia* v. *Imperial Coal Sales Co.* (293 U. S. 15, 20) dispelled the idea that intangible property of the kind here involved can be taxed only in conjunction with the taxation of real estate or tangible personal property.

Some Cases Distinguished

The case of *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, involves an income tax, not an *ad valorem* property tax upon intangibles. The income tax is imposed upon the earning of money as distinguished from the ownership thereof. Obviously, all the income considered in the *Hans Rees' Sons* case was not earned in North Carolina and North Carolina could not impose an income tax thereon. This case did not consider the presence of

such intangibles so earned with respect to the determination of the taxable situs for purposes of *ad valorem* property taxation.

The case of *Looney* v. *Crane Co.*, 245 U. S. 178, did not involve an *ad valorem* property tax but a franchise or privilege tax based not upon activities within the State of Texas but upon capital, surplus, and undivided profits not subject in any way to the jurisdiction of the State of Texas.

The case of *Alpha Portland Cement Company* v. *Massachusetts*, 268 U. S. 203, involved a Massachusetts privilege tax upon the cement company, the business of which, in so far as the State of Massachusetts was concerned, was exclusively in interstate commerce. It was simply held that said tax was a burden upon interstate commerce.

In the case of *Baldwin* v. *Missouri*, 281 U. S. 586, it was expressly stated (281 U. S. 590), "The record discloses nothing tending to show that the personal property had been given a business situs in that state."

In the case of *American Barge Line Company* v. *Board* (Ky.), 55 S. W. (2d) 416, there was an attempt on the part of Kentucky to assess not only the accounts receivable of the American Barge Line but also the tangible personal property. The business of the American Barge Line was referred to as a "far flung business." While the office of the company at Louisville seemed to be the chief executive office, all of the executive functions of the company were not managed there, as appears to be true in the case at bar, but the company had other offices at Pittsburgh, Cincinnati, Louisville, Memphis, New Orleans, and Chicago, where important executive functions were also performed. The decision recognizes the principle of the business situs but simply held that it had not been established in that case.

If it be considered that the decision was on the basis that all of the intangibles were taxable in Delaware, the state of incorporation, we do not believe that the opinion is sound in principle or in keeping with the "business situs" decisions of this Court.

In the case of *Frick* v. *Pennsylvania,* 268 U. S. 473, it was held that Pennsylvania could not impose an inheritance tax upon the estate of the decedent domiciled in Pennsylvania in so far as it pertained to tangible personal property actually located in another state and that such property located in another state could not be considered in determining the rate to be imposed upon the property actually located in Pennsylvania.

The case of *Farmers Loan & Trust Company* v. *Minnesota,* 280 U. S. 204, overruled the case of *Blackstone* v. *Miller,* 188 U. S. 189, which had held that the situs of notes and accounts receivable was at the domicile of the debtor, and held that in the absence of the establishment of a business situs, the situs of such intangible property was at the domicile of the creditor.

In this connection it may be noted that while counsel for appellant repeatedly refer to the fact that the case of *Blackstone* v. *Miller* was overruled by the *Farmers Loan & Trust Company* case, apparently in making its original report to the assessor of Ohio County, West Virginia (Br. 7), acting upon the advice of counsel (Br. 6), appellant relied upon *Blackstone* v. *Miller* in reporting for assessment in West Virginia only the accounts and notes receivable in West Virginia owed to appellant by residents of West Virginia.

Appellant's position in this regard would seem to be rather inconsistent.

Other cases relied upon by appellant are, we believe, sufficiently considered elsewhere herein.

The Business Situs Cases

At pages 28-32 of appellant's brief, counsel comment upon the business situs cases decided by this Court, and emphasis is laid upon the fact that in *New Orleans* v. *Stempel*, 175 U. S. 309, and *State Board of Assessors* v. *Comptoir National D'Escompte*, 191 U. S. 388, the physical presence of the notes in Louisiana was the basis of the decisions. But counsel further point out that in the cases of *Bristol* v. *Washington County*, 177 U. S. 133, and *Metropolitan Life Insurance Company* v. *New Orleans*, 205 U. S. 395, the evidences of the indebtedness were kept in New York, except when their presence was required in Minnesota and Louisiana, respectively. In several of these cases *Blackstone* v. *Miller* was cited. We believe, however, that the real basis of the decision in these several cases was not the principle of *Blackstone* v. *Miller* that the situs of such intangibles was at the domicile of the debtor, or that the notes had a physical presence in the taxing states, but that as stated in *Liverpool L. & G. Insurance Company* v. *Board of Assessors:* "The legal fiction expressed in the maxim *mobilia sequuntur personam* yields to the fact of actual *control elsewhere.*" (Italics ours), as appears from page 30 of appellant's brief.

Allocation and Division of Governmental Powers

At pages 32-40 of brief counsel for appellant make further reference to the matter of the allocation of intangibles with respect to the states from which such intangibles have been earned or derived. As hereinbefore stated, we do not believe the question of allocation is involved in this case, it being one relating to *ad valorem* property taxation and not relating to an income or privilege tax.

Here, we do not have an attempt to delegate the legislative power of prescribing some plan of allocation, because allocation is not involved. All that is here involved is the administrative problem of determining what property is in West Virginia. Section 1, Article 5, Chapter 11 of the Code of West Virginia hereinabove referred to, says that all such property in West Virginia shall be taxed. It is not believed that there is thereby vested in the assessor or the tax commissioner any legislative power but purely an administrative power. True, some administrative discretion must be exercised, but that is true in the performance of practically every executive act. It is not believed that the cases of *Panama Refining Company* v. *Ryan*, 293 U. S. 388, and *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, are any authority for the proposition that vesting in an administrative officer the duty of determining what property is within the State of West Virginia constitutes any delegation of legislative power. To the contrary, in *Panama Refining Company* v. *Ryan*, 293 U. S. 388, at page 421, it was observed:

> "* * * Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits *and the determination of facts* to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative

> power which in many circumstances calling for its exertion would be but a futility. * * *." (Italics ours.)

It is believed that the ascertainment of property subject to taxation is universally recognized as a mere administrative function within the observation just quoted.

In the Virginia case of *Commonwealth* v. *P. Lorillard Company, Inc.*, 105 S. E. 683, an income tax was involved with no legislative standard for determining what income was derived through Virginia activities with respect to a company carrying on business in many states. This was, in truth, a legislative failure.

The case of *Southern Express Company* v. *Patterson* (Tenn.), 123 S. W. 353, did not involve the jurisdiction of the State of Tennessee to tax, but an absence of plan for assessing a tax upon intangibles where a corporation did business in more than one county within the State of Tennessee. Our statutes (Section 13, Article 3, Chapter 11 of the Code of West Virginia with respect to corporations, and Section 15, Article 3, Chapter 11 of the Code of West Virginia with respect to natural persons, and Section 4, Article 5, Chapter 40, Acts 1933, Regular Session, relating to both) make provision for assessments in the counties and several magisterial districts.

The case of *State* v. *Humble Pipe Line Company* (Tex.), 247 S. W. 1082, involved a privilege tax on pipe lines, proportioned with respect to the entire business of the corporation upon the length of line within the State of Texas as compared with the total length of the line. It was held that this was not a proper basis since the ability of the State of Texas to tax was not properly predicated upon the length of the line in Texas but upon the character of commerce transported, whether that be intra-state or interstate. Obviously, a line located en-

tirely within the State of Texas but connected with lines of other companies running in other states might be used entirely for interstate commerce and not at all for intrastate commerce. A privilege tax upon such business would be a burden upon interstate commerce. An *ad valorem* property tax was not involved.

The Virginia case of *Sussex County* v. *Jarratt*, 106 S. E. 384, merely involved an assessment of shares of stock in a bank which assessment did not follow the statutory procedure provided therefor, and, apparently, has no relation to the case at bar other than to state the general proposition that tax statutes are construed liberally in favor of the taxpayer.

Commonwealth v. *Wilson* (Virginia), 126 S. E. 220, merely related to the taxation of a life estate and the remainder in real estate and held that there could be no allocation between the life tenant and the remainderman in the absence of a statute providing therefor.

Appellant's Illustration of the Ohio Resident Engaging in Business in West Virginia

At pages 42-43 of the brief, appellant suggested that a resident of Ohio doing business both in Wheeling, West Virginia, and in Ohio, but with his principal office in Wheeling, would not pay any tax in West Virginia upon the money which he may have deposited in banks in Pennsylvania derived from goods manufactured and sold in Ohio; nor would he pay tax in West Virginia upon the credits arising from his Ohio business, even though such business was directed from his Wheeling office. We cannot agree with the conclusions of counsel for appellant on this illustration. Section 1, Article 5, Chapter 11 of the Code of West Virginia, imposes a tax upon the intangible property of a non-resident when such property is actually in West Virginia. If the non-resident

conducted all of his business affairs in West Virginia in the manner in which the Wheeling Steel Corporation here conducts its business, undoubtedly, the intangible property of the individual would acquire in West Virginia a business situs just as well as has the intangible property of the Wheeling Steel Corporation acquired a business situs in West Virginia. Said Section 1, Article 5 of Chapter 40 of the Acts of 1933, amending said section and article of Chapter 11 of the Code of West Virginia, in defining what property shall be taxed, includes, "all personal property in the State, though owned by persons residing out of the State." It is believed that this provision would cover the illustration of counsel for appellant.

Appellant's Cases on Unreasonable Classification for Purposes of Taxation

Believing that we have heretofore shown by a consideration of the statutes of West Virginia relating to the taxation of intangible personal property that no question of classification is here involved, we do not comment upon the cases cited by counsel for appellant holding various classifications unreasonable, such as *Quaker City Cab Company* v. *Pennsylvania*, 277 U. S. 389; *Royster Guano Company* v. *Virginia*, 253 U. S. 412, and other. We readily concede the principles for which these cases stand.

CONCLUSION

In conclusion, it is respectfully submitted:

(1) That the money in bank and accounts receivable of Wheeling Steel Corporation here involved have a taxable situs in the State of West Virginia;

(2) That the statutes of West Virginia, defining what intangible property is liable to taxation in West Virginia and prescribing the methods for the assessment of such intangible property, are not discriminatory as against appellant or other corporations similarly situated; but extend the equal protection of the laws to all persons, corporations and natural persons as well; and are not violative of the Fourteenth Amendment to the Federal Constitution; and

(3) That the judgment appealed from should be affirmed.

Respectfully submitted,

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APPENDIX

Section 2, Article 3, Chapter 11, Code of West Virginia, reads as follows:

"*Canvass by Assessor; Lists of Property.*—On the first day of January, in each year, the assessors and their deputies shall begin the work of assessment in their respective counties, and shall, from that date, diligently and continuously pursue with all reasonable dispatch their work of assessment until the same is completed: *Provided, however,* That the assessor and his deputies shall finish their work of assessment, and complete the land and personal property books not later than the first day of July. Beginning on the first day of January, as aforesaid, the assessor or a deputy shall call upon every person in the territory, appointed to such assessor and deputy, who is liable to assessment, and thereupon such person shall furnish to such assessor, or his deputy, a full and correct description of all of the real estate and personal property of which he was the owner on the first day of January of the current year, fixing what he deems to be the true and actual value of each item of property, both real and personal, for the guidance of the assessor, who shall finally settle and determine the actual value of each item of such property by the rule prescribed in section one of this article; such person shall also, at the same time, make separate, full and true statements, in like manner, and upon similar blanks to be furnished him, distinctly setting forth in each a correct description of all the property, real and personal, held, possessed or controlled by him, as executor, administrator, guardian, trustee, receiver, agent, partner, attorney, president or accounting officer of a corporation, consignee, broker, or in any representative or fiduciary character, and he shall fix what he deems the true and actual value thereof to each item of such property which valuation shall be

subject to revision and change by the assessor in like manner as property owned by such person in his own right: *Provided, however,* That no person shall be compelled to furnish the list mentioned in this section sooner than the tenth day of January of the current year.

"The assessor shall perform such other duties while making his assessment as may be required of him by law."

Section 4, Article 3, Chapter 11, Code of West Virginia:

"*Oath of Owner.*—The assessor and his deputies are empowered to administer oaths in all matters pertaining to their official business, and every such list provided to be made out by the two next preceding sections shall be sworn to or affirmed, by the person making the same, before it shall be received by the assessor or any of his deputies; the form of such oath or affirmation, when made by the person owning the property (and the oath or affirmation of the owner of the property shall be required in all cases where it is practicable, instead of the oath or affirmation of his agent or manager), shall be substantially as follows, to-wit:

"State of West Virginia, county of_____ss:
I, _____, do solemnly swear (or affirm) that to the best of my knowledge, information and belief, the foregoing statement contains a true, full and correct list of all property, real and personal, owned by me on the first day of the assessment year; that where I have been unable to exhibit any class of property to the assessor or to his deputy, such property has been fully and fairly described to him and its true condition represented; that I have in no case sought to mislead the assessor or his deputy, as to the entire quantity, quality or value of the property; that I have

reported all moneys and the value of all credits and investments owned by me on the said day and liable to taxation, except bonds of the United States, and other tax exempt securities, and except stock in a banking institution, and other incorporated companies whose property is assessed in the name of such corporation either within or without this State; that, since the first day of the assessment year, I have not directly or indirectly converted or exchanged any of my property temporarily for the purpose of evading the assessment thereof for taxes into nontaxable property or securities of any kind; that I have, to the best of my knowledge and judgment, valued the said property, both real and personal, at its true and actual value on the first day of the assessment year, by which I mean the price that could be obtained for said property at private or voluntary sale, and on such terms as are usually employed in the selling of such property, and not the price which might be realized at a forced or auction sale; so help me, God.

"Subscribed and sworn (or affirmed) to before me this_____day of_____, 19____.

_____Assessor.

By_____."

Section 2, Article 5, Chapter 40, Acts of the Legislature, Regular Session, 1933—Form of personal property books; copies; extension of levies.

"In his personal property books the assessor shall enter the names and post office addresses of the owners of personal property and of other persons liable to capitation tax, alphabetically arranged by districts, showing separately the values of:

"(1) All tangible personal property employed exclusively in agriculture including horticulture and grazing;

"(2) All products of agriculture (including live stock) while owned by the producer;

"(3) All money, notes, bonds, bills and accounts receivable, stocks and any other intangible personal property;

"(4) The total of one, two and three;

"(5) All other tangible personal property.

"The tax commissioner may prescribe such itemization and further information as he deems necessary. The assessor shall make the same number of copies and extend the levies in the same way as he does with the land-book."

Section 4, Article 5, Chapter 40, Acts of the Legislature, Regular Session, 1933—Where personal property shall be listed for taxation; value of assessed leasehold estate to be deducted from total value of estate:

"Every person required by law to list personal property for taxation shall list the tangible personal property in the magisterial district wherein it is on the first day of the assessment year, and chattels real in the magisterial district wherein the land to which they relate is located; and he shall list for taxation in the magisterial district in which he resides the money, notes, bonds, bills and accounts receivable, stocks and other intangible personal property subject to taxation belonging to himself or under his charge or control, whether the same, or the evidence thereof be in or out of the state; but capital, money and intangible property (except real estate and chattels real) employed in any trade or business (other than agriculture) belonging to a company whether it is incorporated or not, or to an individual, shall be assessed for taxation in the magisterial district wherein the principal office for the transaction of the financial concerns

pertaining to such trade or business is located; or, if there be no such office, then in the district where the operations are carried on. Goods and chattels and other tangible personal property not exempt from taxation which may not be assessed for taxation in the magisterial district where the same were on the first day of the assessment year, but which have been removed therefrom, shall be assessed in the magisterial district where the same were on the first day of the assessment year; but the assessment and payment of taxes in any county or district in any year shall exonerate the owner of such property in any other county or district for such year: *Provided, however,* That in cases of the assessment of leasehold estates a sum equal to the valuations placed upon such leasehold estates shall be deducted from the total value of the estate, to the end that the valuation of such leasehold estate and the remainder shall aggregate the true and actual value of the estate."

Section 6, Article 5, Chapter 11, Code of West Virginia:

"*Deduction of Indebtedness.*—In listing money, credits, or investments the person owning the same may have deducted therefrom the amount of the indebtedness which he owes to others as principal debtor, but not what he may be liable for as surety or indorser, unless the principal debtor is insolvent and the surety or indorser is not indemnified; but before such deduction shall be allowed, the person desiring the same shall be examined under oath as to each debt which he desires to have deducted, when payable, and the amount thereof, including the interest, to the first day of the assessment year; after such examination, if the assessor be satisfied that the debts so claimed are bona fide and correct in amount, he shall allow and deduct the amount of the same from the valuation of such debtor's money, credits and invest-

ments, but not from the valuation of any other kind of property, and shall extend the taxes upon the remainder of such money, credits and investments; if such indebtedness equals or exceeds in amount the money, credits and investments, no taxes shall be extended on account of the same; the total valuation of money, credits and investments, after deducting therefrom the amount of such indebtedness, shall be placed in a column opposite the name of the owner thereof in the personal property book; if debts to be deducted are owing by such persons as coobligor or cosureties, or joint indorser, with others who are solvent, he shall be allowed to deduct only so much of such debt as he may have to pay after his coobligors or his cosureties or joint indorsers shall have paid their portion thereof; any special commissioner, guardian, executor, trustee or other fiduciary may claim the deductions which his principal, cestui que trust, ward, decedent or other beneficiary might have claimed as to such assessment; to the end that the assessor be enabled to make diligent and careful inquiry as to such debts, money, credits and investments, the justness and correctness thereof, he is hereby given the authority to administer oaths to any and all persons and examine them under oath as to any and all matters pertaining to a fair and full disclosure of the same; and any person who shall make a false statement, or shall state fictitious debts for the purpose of having the amount thereof deducted as herein provided for, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than fifty nor more than five hundred dollars."

Section 11, Article 6, Chapter 11, Code of West Virginia:

"*Valuation of Property by Board.*—As soon as possible after the board of public works shall have procured the necessary information to enable it to do so, and, at

the latest, before the first day of June, said board shall proceed to assess and fix the true and actual value of all property of such owner or operator hereinbefore required to be returned, so far as the said board has been able to ascertain the same, in each county through which the railroad, car line, cars, express, telegraph, telephone, or pipe line of any such owner or operator runs, and in which any property to be assessed is located. In ascertaining such value the board shall consider the return, if any, made by the owner or operator, and any return which may have been previously made by such owner or operator, and all the evidence and information it has been able to procure by the means aforesaid, and such as may be offered by such owner or operator. When the board of public works has assessed any property hereby required to be returned, and has determined the valuation thereof, such assessment and valuation shall be entered of record in the book of minutes of its proceedings, and shall be certified by the secretary of the board to the auditor. Nothing in this chapter contained shall be construed to require the assessment by the board of public works of any part of the railroad, telegraph, telephone or pipe line until such part is so far completed as to be fit for use. But material held by any railroad, telegraph, telephone or pipe line company shall be returned to the board of public works for assessment as personal property. As soon as such assessment is made, the secretary of the board shall notify the owner or operator affected thereby of the amount thereof by written notice deposited in the post office, addressed to such owner or operator at the principal office or place of business of such owner or operator. Such assessment and valuation shall be final and conclusive, unless the same be appealed from in the manner following, within thirty days after such notice is so deposited."

p. 5

SUPREME COURT OF THE UNITED STATES.

No. 663.—October Term, 1935.

Wheeling Steel Corporation, Appellant, *vs.* Fred L. Fox, State Tax Commissioner of West Virginia, and Karl G. Sailer, Assessor of Ohio County, West Virginia.	Appeal from the Circuit Court of Ohio County, State of West Virginia.

[May 18, 1936.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This appeal presents the question of the validity of an *ad valorem* property tax laid by West Virginia upon accounts receivable and bank deposits of appellant, Wheeling Steel Corporation, organized under the laws of Delaware.

The tax statutes[1] were assailed upon the ground that, as applied, they violated the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. The proceeding was a statutory one, instituted by appellant in the Circuit Court of Ohio County, West Virginia, to review a county assessment which was made as of January 1, 1933. The judgment of that court, reducing the assessment, was reversed by the Supreme Court of Appeals of West Virginia. *In re Wheeling Steel Corporation Assessment*, 115 W. Va. 553. The Circuit Court then entered final judgment which the Supreme Court of Appeals refused to review. The case comes here on appeal.

The case was submitted upon agreed statements which disclosed the following facts: The Corporation maintains its principal office in Delaware through the Corporation Service Company, as permitted by the laws of that State. It keeps there a duplicate stock ledger and records of all transactions with respect to its capital stock, the originals of such ledger and records being kept in New

[1] The statutes to which appellant refers are: Code of West Virginia, Chapter 11, Article 3, sections 12, 13, 15, Article 5, section 1, Article 6, section 2, Article 12, section 71; Chapter 31, Article 1, section 79.

York City. It files reports and pays franchise taxes as required by Delaware.

The general business offices of the Corporation are located in Wheeling, Ohio County, West Virginia. There, the general books and accounting records are kept. The chairman of the board, president, treasurer, secretary and chief counsel reside at Wheeling. There, its stockholders' and directors' meetings, as permitted by the laws of Delaware, are held. Dividends, when declared, are ordered to be paid and distributed at meetings held at Wheeling, although the checks are drawn and distributed by the dividend disbursing agent located in New York City, and are paid with funds there deposited.

The Corporation maintains sales offices in various cities of the United States. Sales contracts are negotiated and orders are taken by these offices subject to acceptance or rejection at Wheeling.

The principal manufacturing plants of the Corporation are located in the State of Ohio. The plant offices maintain original detailed accounting records showing materials received, railroad cars received and shipped, detailed labor costs, production and shipments, and detailed stocks of goods and payrolls. Employment offices are maintained at each plant. The Portsmouth, Ohio, plant makes up and mails out invoices for all products shipped from that plant, together with bills of lading and shipping notices. The other plants prepare complete invoices with exception of information relating to the price of materials described. The latter invoices are then forwarded to Wheeling where they are completed and mailed to the customer. Bills of lading and shipping notices are, however, mailed to customers from the individual plants. All invoices are payable in Wheeling. The majority of commercial accounts are paid by check issued at Wheeling. Payrolls are made up and payroll checks are prepared and signed at the various plants and are there distributed to the employees. Such checks are paid with funds on deposit in banks in the localities where the plants are situated.

The Corporation owns vessels operating on the Allegheny, Ohio and Mississippi Rivers, transporting coal and steel. These vessels are registered at the port of Pittsburgh.

The total assessed value of the real estate and tangible personal property owned by the Corporation on January 1, 1933, was $31,977,600. The assessed value of its real estate and tangible per-

sonal property in West Virginia was $8,673,205, or 27.10 percent. of the total.

At least 80 percent. of the sums spent by the Corporation in the conduct of its business, including the purchase of materials, maintenance and repairs of plants, building of improvements, property additions, payrolls and other operating expenses were made in connection with the operation of its plants and business outside the State of West Virginia and all such payments, aside from moneys borrowed, were made from the proceeds of sales of its products. The moneys thus expended in the conduct of its business in Ohio and States other than West Virginia are expended by executive action taken at Wheeling, and by the drawing of checks or drafts at that place, except in connection with the payment of payrolls at its Portsmouth, Ohio, and Steubenville, Ohio, plants, where payroll checks or orders are drawn against moneys sent to banks at those points for the express purpose of meeting the payrolls and for incidental items as they arise. All moneys are controlled and the expenditures directed by the Wheeling office, and if the immediate expenditure be made elsewhere, it is made only under specific or general direction and control of that office.

On January 1, 1933, the Corporation had on deposit to its credit in various banks the sum of $2,307,773.61, of which $849,161.99 was on deposit in West Virginia. Of the last mentioned amount the Corporation had received $121,684.91 from sales of goods manufactured in West Virginia and the remainder from sales of goods manufactured in, and shipped from, points outside that State. The money on deposit in banks outside West Virginia on January 1, 1933, had been deposited by the Corporation by sending from its Wheeling office the original checks or drafts received from its customers. The deposits outside West Virginia are not segregated for the purpose of keeping separately the receipts from sales of products manufactured in, and shipped from, West Virginia plants. Ordinarily not more than 20 percent. of the total amounts on deposit at any time within and without West Virginia have been derived from sales of products manufactured in that State.

The total amount of the Corporation's accounts and notes receivable on January 1, 1933, was $2,234,743.11. Of this amount, $374,410.42 were receivables for goods sold and manufactured in, and shipped from, West Virginia to resident and non-resident purchasers. It appeared that the Corporation had been assessed in

Ohio, as of January 1, 1933, on accounts and notes receivable amounting to $250,133.42.

The Supreme Court of Appeals of West Virginia held that there had been "such a localization of the corporation's business at Wheeling" that there was imparted "to its entire intangible property a *prima facie* situs for taxation at that place". But the court thought that the "stautory limitation of the assessment to property 'liable to taxation'" indicated that the legislature "did not propose to tax intangibles which were primarily subject to taxation in another jurisdiction". And referring to the above mentioned taxation in Ohio, the Supreme Court of Appeals said: "For the purposes of this opinion, we assume that the claim of our sister state is well founded, and should be deducted from the assessment as corrected by the Tax Commissioner". And in remanding the cause to the Circuit Court, the Supreme Court of Appeals gave opportunity to have it determined "whether or not further deductions should be made with reference to the legal demands of other states". In the further proceeding in the Circuit Court, it was stipulated that "no states other than Ohio and West Virginia have assessed taxpayer upon any of its intangibles for the year 1933".

First.—The tax is not a privilege or occupation tax. It is not a tax on net income. See *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, 133. It is an *ad valorem* property tax. We have held that it is essential to the validity of such a tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing state. This rule receives its most familiar illustration in the case of land. The rule has been extended to tangible personal property which is thus subject to taxation exclusively in the State where it is permanently located, regardless of the domicile of the owner. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 204, 206; *Frick* v. *Pennsylvania*, 268 U. S. 473, 489. We have said that the application to the States of the rule of due process arises from the fact "that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution". *United States* v. *Bennett*, 232 U. S. 299, 306. Compare *Burnet* v. *Brooks*, 288 U. S. 378, 401. When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have

no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the owner's domicile for purposes of taxation. *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 211. And having thus determined "that in general intangibles may be properly taxed at the domicile of their owner", we have found "no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles". *Id.,* p. 212. The principle thus announced in *Farmers Loan & Trust Co.* v. *Minnesota* has had progressive application. *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312, 328, 329. But despite the wide application of the principle, an important exception has been recognized.

In the case of tangible property, the ancient maxim, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the "law of the place where the property is kept and used". *First National Bank* v. *Maine, supra.* It was in view "of the enormous increase of such property since the introduction of railways and the growth of manufactures" that it came to be regarded as "having a situs of its own for the purpose of taxation, and correlatively to exempt at the domicile of its owner". *Union Transit Refrigerator Co.* v. *Kentucky, supra,* p. 207. There has been an analogous development in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a State different from that of his domicile. *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *Board of Assessors* v. *Comptoir National,* 191 U. S. 388; *Metropolitan Life Insurance Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool & L. & G. Insurance Co.* v. ~~*New Orleans*~~ Board of Assessors, 221 U. S. 346.

These cases, we said in *Farmers Loan & Trust Co.* v. *Minnesota, supra,* p. 213, "recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business". We adverted to this reservation in *Beidler* v. *South Carolina Tax Commission, supra,* p. 8, and in *First National Bank* v. *Maine, supra,* p. 331.

In the instant case, both parties recognize the principle and the exception. It is appellant's contention that the State creating a corporation has the sole right to tax its intangible property "unless such intangible property has acquired a 'business situs' elsewhere". Counsel for the State agrees with appellant on this point and in fact asserts "that, generally, the taxable situs of accounts receivable and of money in bank is at the domicile of the owner". But the State insists that the accounts receivable and bank deposits of the Wheeling Steel Corporation had acquired a taxable situs in West Virginia and that they have no taxable situs in Delaware, where the Corporation was chartered.

Second.—The Corporation complied with the laws of the State of its creation in designating its "principal" office in that State. It is manifest that this designation, while presumably sufficient for the purpose, was a technical one and that the office is not a principal office so far as the actual conduct of business is concerned. While a duplicate stock ledger and records of transactions with respect to capital stock are maintained in Delaware, the business operations of the Corporation are conducted outside that State. The office in Delaware is maintained through the service of an agency organized to furnish this convenience to corporations of that description. To attribute to Delaware, merely as the chartering State, the credits arising in the course of the business established in another State, and to deny to the latter the power to tax such credits upon the ground that it violates due process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering State all the tangible possessions of the Corporation without regard to their actual location.

The constitutional authority of West Virginia to tax the accounts receivable and bank deposits in question cannot be denied upon the ground that they are taxable solely in Delaware. The question is whether they should be deemed to be localized in West Virginia.

Third.—The Corporation established in West Virginia what has aptly been termed a "commercial domicile". It maintains its general business offices at Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the Corporation. There, as appellant's counsel well says, "the management functioned". The Cor-

poration has manufacturing plants and sales offices in other States. But what is done at those plants and offices is determined and controlled from the center of authority at Wheeling. The Corporation has made that the actual seat of its corporate government.

The question here is not of the taxation of the plants in other States. The real estate, equipment and all tangible property there located is taxable by those States respectively. The accounts receivable with which we are now concerned are the proceeds of contracts of sale. While these contracts are negotiated and orders are taken at the various sales offices throughout the country, they are subject to acceptance or rejection at the Wheeling office. All invoices are payable at Wheeling. Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are kept and the required payments are made. In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken. The tax is not on the manufacturing or on the privilege of maintaining sales offices. The tax is not on the net profits of a unitary enterprise demanding a method, not intrinsically arbitrary, of making an apportionment among different jurisdictions with respect to the processes by which the profits are earned. *Underwood Typewriter Company* v. *Chamberlain*, 254 U. S. 113, 120, 121; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271, 282, 283; *Hans Rees' Sons* v. *North Carolina, supra.* Such a tax on net gains is distinct from an *ad valorem* property tax on the various items of property owned by the Corporation and laid according to the location of the property within the respective tax jurisdictions. Here, the tax is a property tax on the accounts receivable, as separate items of property, and these are not to be regarded as parts of the manufacturing plants where the goods sold are produced.

Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one "which allocates intangibles on the basis of tangible property owned and used in production of material for sale". This is to confuse two distinct subjects of *ad valorem* property taxation, the accounts receivable which arise from sales and the manufacturing plants. The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale. We said, in

Virginia v. *Imperial Coal Sales Co.*, 293 U. S. 15, 20, that we were not able to perceive "any sound reason for holding that the owner must have real estate or tangible property within the State in order to subject its intangible property within the State to taxation".

The tax is laid both on accounts receivable and on the amount of deposits in banks. It appears that the Corporation has deposit accounts in several States. The deposits outside West Virginia were made by sending from the Wheeling office to the various banks the original checks or drafts received by the Corporation from its customers. From these deposit accounts the Corporation, by executive action at Wheeling, pays the amounts required for payrolls, materials, equipment, maintenance and operating expenses as these amounts become payable in the course of its operations in Ohio and other States. Checks and drafts on these bank accounts are drawn at Wheeling, except in connection with the payment of payrolls at certain manufacturing plants where payroll checks or orders are drawn against moneys sent to banks at such points for that express purpose and for meeting incidental items. The agreed statement shows that "All moneys are controlled and the expenditures directed by the Wheeling office, and if the immediate expenditure be made elsewhere, such immediate expenditure is made only under specific or general direction and control of the Wheeling office". The so-called "money in bank" is not cash or physical property of the Corporation but is an indebtedness owing by the bank to the Corporation by virtue of the deposit account. From the Wheeling office proceed the items deposited and there the withdrawals are directed and controlled. In the light of this course of business as shown by the agreed statements of fact, we find no sufficient basis for concluding that the bank accounts thus maintained and controlled were properly attributable to the Corporation at any place other than at its general office at Wheeling. If there were any special circumstances by which any of these deposits could be deemed to have been localized elsewhere, they do not appear upon the present record.

The state court permitted the deduction of the amount of the intangible property of the Corporation which had been assessed in Ohio. That assessment, according to the agreed statement, was "on accounts and notes receivable". Counsel for the State, while insisting that the record does not show a taxable situs in Ohio of any

of appellant's accounts receivable, has not taken a cross appeal or sought to assign error with respect to this part of the judgment of the Supreme Court of Appeals. The State is not in a position to complain of the deduction and no question as to its propriety is before us upon this record. Appellant urges that in Ohio "only the excess of receivables and prepaid items over current payables" is actually taxed, and that the deduction of "current indebtedness" accounts for the amount of the Ohio assessment. The inference is sought to be drawn that the amount of accounts receivables taken into consideration in Ohio was thus larger than the amount assessed. We find no basis for a conclusion whether, or to what extent, deductions were allowed in Ohio. The stipulation states that the appellant had been assessed "on accounts and notes receivable" in the amount which the state court of West Virginia has allowed. Upon this record the question before us is with regard to the constitutional validity of the tax as sssessed in West Virginia and not as to the amount or validity of any tax assessed elsewhere.

Further, we find no ground for appellant's contention that the statutes of West Virginia, under which the tax is laid, are invalid in the view that they require the taxation of all the intangibles of a foreign corporation doing business within the State, regardless of the place where such intangibles may properly be the subject of taxation. We think the argument is sufficiently met by the construction placed upon these statutes by the state court. It held that the legislature intended to limit the assessment to property which was liable to taxation according to the facts and the applicable principles of law. Nor would this inquiry of the state officials into the facts involve, as contended, any delegation of authority of which complaint could be made under the Federal Constitution. The taxing officials would apply the law to the facts of the case subject to review by the courts of the State and ultimately by this Court so far as any federal question might be involved.

Our conclusion is that appellant has failed to show that West Virginia in laying the tax has transcended the limits of its jurisdiction and thus deprived appellant of its property without due process of law.

Fourth. Appellant also contests the tax upon the ground that equal protection of the laws has been denied. The argument is

that the statutes, as construed, require that the total intangibles of appellant are to be reported and assessed, except that portion taxed in other States, and hence that the statutes discriminate unlawfully against business corporations and in favor of natural persons. Appellant also urges discrimination on the basis of a comparison with the provisions for the taxation of the property of railroads and other public utilities. Counsel for the State presents an analysis of the state statutes and insists that there is no discrimination between the assessment of the intangibles of corporations, either foreign or domestic, and of those of natural persons, or with respect to the assessment of corporations engaged in public service.

The contention of appellant is that we should deduce the protested discrimination from the face of the respective statutes. But we do not find that their provisions require the asserted construction and we have not been advised of decisions of the state court placing such a construction upon them. The decision in the instant case, as we have seen, is not that the statutes require taxation in West Virginia of all of the intangibles of appellant, without due regard to the place where they may properly be deemed to be localized, but only of such intangibles as upon the facts and the law, according to the course of business, may be deemed to be within the jurisdiction of the State. The record discloses no discrimination of which appellant is entitled to complain.

The judgment of the state court is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.